No. 78-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner American Telephone and Telegraph Company requests that a writ of certiorari be issued to review the opinion and order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The April 14, 1978, opinion of the Court of Appeals, which is not yet officially reported, appears as Appendix A to this petition.[1] The lower court's subsequent opinion denying a motion for a stay pending certiorari, which is not officially reported, appears as

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[1] The appendices are separately bound in a companion volume cited as "Pet. App."

Appendix B. The February 28, 1978, Memorandum Opinion and Order of the Federal Communications Commission, which is not yet officially reported, appears as Appendix C.

JURISDICTION

The order of the Court of Appeals entered April 14, 1978, which together with its opinion constitutes its judgment in this case, appears as Appendix D. The Court of Appeals denied rehearing and suggestion of rehearing *en banc* on May 8, 1978, by orders which appear as Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Congress in Section 201(a) of the Communications Act of 1934, 47 U.S.C. § 201(a), provided that physical connections between carriers may be ordered only after a hearing and findings by the Federal Communications Commission that the interconnections sought are "necessary or desirable in the public interest." In this case, the District of Columbia Circuit has—over the Commission's objection—directed the Commission to order that physical connections be established between telephone companies and a specialized carrier to permit the latter to offer long distance telephone service ("switched public message service"). The questions presented are:

1. Whether in mandating physical connections, the Court of Appeals unlawfully exercised an administrative function which Congress in Section 201(a) explicitly reserves to the Commission and which can validly be exercised only after public interest findings that the Commission has not made in this case.

2. Whether the Court of Appeals, in extending existing interconnection obligations to switched public message service, impermissibly contradicted a contrary prior decision of the Third Circuit rendered under a statute giving the Third Circuit "exclusive jurisdiction" to review the Commission's interconnection orders. 28 U.S.C. § 2349.

STATUTES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, and the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, appear as Appendix F.

STATEMENT OF FACTS

A. The Statutory Plan and Background of This Case

The FCC authorizes common carriers to construct, acquire and operate communications facilities under Section 214 of the Act, 47 U.S.C. § 214.[2] A carrier then makes its offering to the public by filing tariffs pursuant to Sections 203-05 of the Act, 47 U.S.C. §§ 203-05. A Section 214 authorization, however, relates only to the use a carrier may make of its own facilities and provides a carrier no right to compel other carriers to interconnect with it. Interconnection rights can be conferred only after a separate affirmative determination by the Commission under a different provision of the Act.

Carrier interconnection rights and obligations are controlled by Section 201(a), which imposes a limited

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[2] If a carrier uses radio facilities, it is also required to obtain radio facility construction permits and licenses under Title III of the Act. Sections 308-09, 47 U.S.C. §§ 308-09.

qualification on a carrier's common law right not to provide physical connections with other carriers.[3] Section 201(a) directs a carrier to establish physical connection with another carrier only "in accordance with the orders of the Commission" issued after opportunity for hearing.[4] Section 201(a) requires, as a condition precedent to interconnection orders, that the FCC affirmatively find that the proposed provision of interconnection facilities will be necessary or desirable in the public interest. *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250, 1270 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).[5]

In 1971, the FCC created a class of common carriers known as "specialized carriers," and proposed to grant them Section 214 and Title III authorizations to provide specialized private line telecommunications services using microwave radio.[6] The FCC

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[3] *E.g.*, *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 45 F.2d 995, 997 (8th Cir. 1930), *cert. denied*, 283 U.S. 822 (1931). Section 201(a) "does not require the establishment of through routes in the absence of an order by the Commission, nor does it provide for the compulsory establishment of physical connection between carriers" absent such an order. *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 14 (1934).

[4] Section 201(a) provides: "It shall be the duty of every common carrier . . . in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers . . . ." 47 U.S.C. § 201(a).

[5] A copy of the Third Circuit's opinion appears as Appendix G.

[6] *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub. nom. Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). A private

distinguished "private line" service from switched "public message" services like ordinary long distance telephone service. 29 F.C.C.2d at 911, 915.[7] The decision did not make any affirmative finding in favor of switched public message competition (see p. 8, below). Similarly, it made no determination that the Bell System should provide interconnection facilities to specialized carriers for use in providing this service, an issue that was not even before the Commission.

Thereafter, MCI—one of the specialized carriers authorized by the FCC—sought to connect its intercity lines with local exchange facilities of the Bell System so that MCI could provide certain services subsequently deemed to be private line services by the Commission. The FCC instituted a separate interconnection proceeding under Section 201(a). After extensive submissions, the FCC entered orders expressly designed to achieve its objective of private line competition. *Bell System Tariff Offerings,* 46 F.C.C.2d 413, 427 (1974). The orders required the Bell System to provide interconnection facilities to

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line service—providing dedicated circuits—is one "whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. § 21.2.

[7] The Department of Justice supported this distinction. Brief of the FCC and United States, pp. 4-5, *Washington Utils. & Transp. Comm'n* v. *FCC, supra;* brief of FCC and United States, pp. 5-6, *Bell Telephone Company of Pennsylvania* v. *FCC, supra.* A public message service—such as ordinary long distance telephone service—is one "whereby facilities are offered to the public between all points served by a carrier or by interconnected carriers on a non-exclusive message-by-message basis, contemplating a separate connection for each occasion of use." 47 C.F.R. § 21.2.

specialized carriers for specialized and other private line services. *Id.* at 438.

On review, the Third Circuit affirmed the FCC's interconnection orders in *Bell Telephone Company of Pennsylvania* v. *FCC, supra.* The Bell System argued that the interconnection orders were unduly vague and overbroad. The Third Circuit agreed that the interconnection orders would be "overbroad" if read abstractly (503 F.2d at 1273-74 (Pet. App. 42g)); but it sustained them on the ground that they only required, and validly could only require, the Bell System to provide specialized carriers with "those (interconnection) elements of *private line* services" which were supplied within the Bell System. *Id.* (emphasis added). This construction of the FCC interconnection orders was urged in the Third Circuit by the FCC, the Department of Justice, MCI and another specialized carrier, Southern Pacific Communications Company.[8]

The statute governing review of such FCC orders conferred on the Third Circuit "exclusive jurisdiction" over the interconnection orders, as soon as the Bell System filed its petition for review in that circuit and the record was lodged there by the Commission. 28 U.S.C. § 2349(a).[9] After this Court denied certiorari in *Bell of Pennsylvania,* the Third Cir-

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[8] Brief of FCC and United States, p. 49 & n.14; MCI Brief pp. 52-53; SPCC Brief p. 61, each of which is quoted at paras. 48-49 of the FCC's February 28, 1978 Memorandum Opinion and Order. (Pet. App. 28c-29c).

[9] That provision of the Hobbs Act provides in pertinent part: "The court of appeals in which the record is filed . . . has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."

cuit's decision determining the scope and validity of the Bell System's interconnection obligations became "final" (28 U.S.C. §§ 2349, 2350) and not subject to further review or collateral attack.

B. The Proceedings Below

In January 1975, MCI began to offer its so-called Execunet service.[10] After lengthy proceedings, the FCC determined that Execunet was clearly equivalent to ordinary long distance telephone service and therefore a switched public message service rather than a private line service.[11] Accordingly, the FCC rejected the Execunet tariff as purporting to provide an unauthorized service. *MCI Telecommunications Corp.*, 60 F.C.C.2d 25 (1976). Since it found Execunet beyond the scope of MCI's lawful authority, the FCC had no occasion to consider whether the Bell System was or should be obligated under Section 201(a) to

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[10] Execunet is a replica of ordinary long distance telephone service. As with ordinary long distance service, Execunet customers, utilizing local telephone company exchange facilities, can call from any telephone in one city to any telephone in a distant city on a call-by-call basis; each call requires a new connection; each call is charged a rate based on the distance called and the length of the call, subject to a monthly minimum; and the calls utilize circuits and switching facilities which are not exclusively dedicated to each customer but are utilized by different customers in turn. *MCI Telecommunications Corp.*, 60 F.C.C.2d 25, 42, 59-62 (1976).

[11] The operations of ordinary long distance service (Pet. App. 1h) and of Execunet (Pet. App. 2h) are illustrated in two diagrams, introduced by AT&T in *MCI Telecommunications Corp., supra,* which are reproduced as Appendix H.

provide connections to MCI to assist MCI in providing such a service.[12]

In July 1977, the District of Columbia Circuit reversed the rejection of MCI's tariffs. *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, *cert. denied*, 98 S. Ct. 781 (1978) (*"Execunet"*).[13] The lower court did not disturb the FCC's finding that Execunet was the functional equivalent of long distance telephone service (561 F.2d at 378 (Pet. App. 25i)), but it found that the FCC had never determined *whether* competition in ordinary long distance service would serve the public interest. *Id.* at 380 (Pet. App. 30i). Under the lower court's reading of Section 214, the FCC had to resolve this issue before it could limit MCI to providing private line service.[14] The *Execunet* decision did not purport to decide any interconnection issue; in fact, it distinguished *Bell of Pennsylvania* as involving "a very different issue." *Id.* at 378 n.59 (Pet. App. 25i).

Following the denial of certiorari in *Execunet*, the Bell System promptly asked the FCC to confirm that existing interconnection orders affirmed in *Bell of*

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[12] The Bell System, initially unaware of the actual nature of Execunet, furnished MCI with a limited number of interconnection facilities which MCI then used to provide Execunet. When AT&T discovered that MCI was actually providing ordinary long distance telephone service, AT&T asked the Commission to investigate.

[13] The *Execunet* opinion appears as Appendix I.

[14] The Court of Appeals held that even though an applicant has sought only limited authority, once facilities authorizations have been granted to a carrier, it can use them to provide any service it chooses unless the FCC imposes explicit restrictions based on public interest findings. 561 F.2d at 380 (Pet. App. 30i).

Pennsylvania did not extend to Execunet.[15] The Bell System pointed out that the interconnection orders were clearly limited by the Third Circuit, consistent with the FCC's own representations, to interconnection elements of "private line services" (503 F.2d 1273-74 (Pet. App. 42g)); and that the Commission had now explicitly ruled in *Execunet*—a ruling not questioned by the lower court—that Execunet was not a private line service. 60 F.C.C.2d at 43-44. Accordingly, if MCI desired interconnection facilities from the Bell System for Execunet-type services, a prior hearing and public interest findings were required under Section 201(a) before such an obligation could be imposed.

In a decision released on February 28, 1978 ("MO&O"), the Commission granted the declaratory order sought by the Bell System. Pet. App. 1c. It confirmed that its own prior orders in *Bell System Tariff Offerings* imposed interconnection obligations only with respect to private line services. MO&O, para. 58 (Pet. App. 34c). The Commission also recognized that it was "bound by the Third Circuit's interpretation" of *Bell of Pennsylvania* that the existing interconnection orders were "limited to private line services." *Id.*, para. 56 (Pet. App. 32c-33c). Moreover, the FCC conceded that the Bell System never had notice or hearing on any broader intercon-

[15] After the Commission's *Execunet* decision, the lower court stayed further expansion of Execunet service, so that no new interconnection facilities were sought; but when the lower court's stay dissolved after the denial of certiorari, AT&T anticipated that it would receive numerous new demands for interconnection facilities. In *Bell of Pennsylvania*, the United States and the FCC advised the Third Circuit in response to the overbreadth argument that "AT&T can seek guidance from the Commission" if questions arose as to the extent of the Bell System interconnection obligations. Brief of FCC and United States, p. 49 n.14.

nection obligation, because—as the *Execunet* decision recognized—the FCC had never purported to consider whether competition for public switched message services should be introduced. *Id.*, para. 62 & n.8 (Pet. App. 37c-38c).

MCI did not seek judicial review in the Third Circuit despite the fact that the interconnection orders in question had been definitively construed in *Bell of Pennsylvania*. Instead, MCI filed a petition in the District of Columbia Circuit, purportedly seeking compliance with the *Execunet* mandate. Even though the *Execunet* decision said nothing about interconnection obligations, MCI's motion sought an order directing the FCC to require the Bell System to provide physical connections, so that MCI could use Bell System facilities to expand Execunet while the public interest impact of such expansion was being considered by the FCC.

On April 14, 1978, the lower court granted MCI's motion.[16] In his "mandate" decision—to which this certiorari petition is directed—Chief Judge Wright admitted that the original "*Execunet* decision is not addressed explicitly to the interconnection issue or to AT&T's obligation to provide interconnection . . . ." Slip op. 11 (Pet. App. 10a-11a). Nevertheless, based on his disapproval of the Commission's reasoning, he granted MCI's motion and summarily directed the Commission to order physical connection for switched public message service. See Pet. App. 15a. The lower

[16] See Pet. App. 1a (opinion), 1d (order). The lower court subsequently issued a memorandum denying a stay pending certiorari which repeated various contentions made in its opinion granting MCI's mandate motion. See Pet. App. 1b.

court reached this result even though Section 201(a) clearly reserves to the Commission the affirmative decision to order interconnection based on findings that such interconnection is "necessary or desirable in the public interest." 47 U.S.C. § 201(a).

In sum, this case is quite different from the original *Execunet* decision. There, the issue was whether Section 214 permitted the Commission to limit a carrier's use of its own facilities, absent public interest findings to support that limitation.[17] Here, the question is whether a federal court has power, in light of Section 201(a) of the Act, to mandate physical connections between carriers where that function is explicitly reserved to the agency and the agency has never made the public interest findings which are a statutory prerequisite to such interconnection orders.

ARGUMENT

Certiorari is warranted in this case for two distinct reasons. First, by requiring the Commission to order interconnection, the decision below usurps the exercise of an administrative power explicitly reserved by Congress to the agency under Section 201(a). The lower court's assumption of the role of super-commission conflicts directly with this Court's admonitions in recent cases, including *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 98 S.Ct. 1197 (1978). The lower court's attempt to dictate the exercise of agency authority is directly

[17] In accordance with *Execunet,* the Commission has begun a proceeding to determine whether the public interest warrants the provision of switched public message services on a competitive or non-competitive basis. Notice of Inquiry and Proposed Rule Making, FCC 78-144, March 3, 1978.

contrary to a decision of this Court involving a similar instance of asserted "mandate" construction. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

Second, the lower court's order requires the FCC to violate a prior, controlling mandate of the Third Circuit. The Third Circuit, having acquired "exclusive jurisdiction" to review the FCC's interconnection orders, construed them as limited to "private line" service and found that they would be overbroad and unsustainable if not so limited. The D.C. Circuit's conflicting construction of the *same* interconnection obligations to extend them to switched public message service invades the Third Circuit's "exclusive jurisdiction" under the Hobbs Act and the finality accorded by that statute to the Third Circuit's prior adjudication. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

I. The Lower Court Has Usurped the Commission's Statutory Power To Order Interconnection and Ignored Congress' Requirement of Public Interest Findings by the FCC.

In Section 201(a), Congress confided to the Commission the power to require physical connections between carriers to the extent ordered by the agency. The carrier, prior to being ordered to interconnect, must be afforded a hearing. 47 U.S.C. § 201(a). Any interconnection order itself must be supported by findings showing that the interconnection is "necessary or desirable in the public interest." *Id.* Such public interest findings, which only the FCC can make, are a "condition precedent" to imposition of any interconnection obligation. *Bell Telephone Company of Pennsylvania* v. *FCC, supra*, 503 F.2d at 1270 (Pet. App. 35g).

The Commission has never ordered interconnection for switched public message service or made any public interest findings to support such interconnection. Certainly no such order was issued in the *Specialized Carrier* case: the lower court's own *Execunet* decision explicitly held that the *Specialized Carrier* decision had not even purported to decide whether switched public message competition would be in the public interest.[18] Absent such a threshold determination, the Commission could not and did not consider whether interconnections should be ordered to assist specialized carriers to provide switched public message service.

Similarly, in *Bell System Tariff Offerings,* the Commission's interconnection orders were expressly designed to assure full and fair competition in the provision of "private line" service. 46 F.C.C.2d at 426. The Commission, supported by MCI, so construed its interconnection order on direct review in the Third Circuit. See p. 6, above. The Third Circuit similarly construed the order as limited to interconnection elements of "private line service." 503 F.2d at 1273-74 (Pet. App. 42g). Even without these prior constructions, the Commission's consistent reading of its own order would, under decisions of this Court, be entitled to controlling weight.[19]

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[18] The *Execunet* decision specifically emphasized that the court was not attempting to decide "whether competition like that posed by Execunet is in the public interest," and said that "[t]hat will be the question for the Commission to decide" on remand. 561 F.2d at 380 (Pet. App. 30i).

[19] *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965); *Immigration and Naturalization Service* v. *Stanisic,* 395 U.S. 62, 72 (1969); *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945).

The lower court's error, however, goes far beyond an unjustified reversal of the Commission. What the lower court did in granting MCI's petition was to *direct* the Commission to order the interconnection facilities sought by MCI. This affirmative requirement of interconnection, summarily imposed by the court over the Commission's objection, is a complete reversal of proper roles and constitutes the usurpation of administrative power repeatedly condemned by this Court. The authority to review an agency order "is not power to exercise an essentially administrative function." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952).[20]

As the *Idaho Power* decision makes clear, the "function of the reviewing court ends when an error of law is laid bare. At that point the matter goes once more to the Commission for reconsideration." 344 U.S. at 20. Even if the Commission's reasoning in this case were inconsistent with the lower court's reasoning in a prior decision—which it is not[21]—a

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[20] This judicially imposed interconnection requirement also violates the rights of the obligated carriers under Section 201(a), since—as the Commission itself admitted—it has never made the public interest findings on which a valid interconnection order for Execunet would have to rest. See MO&O, para. 60 (Pet. App. 36c).

[21] The lower court held in *Execunet* that the lack of a public interest determination for or against Execunet-type competition prevented the FCC from imposing a valid condition limiting MCI's service authority under Section 214. But the lack of such an affirmative determination equally precludes imposing an interconnection obligation on another carrier to provide Execunet interconnections. The Commission's position in this case is thus completely consistent with the reasoning of the original *Execunet* decision. It is the lower court that has now disregarded its own prior reasoning and determinations.

properly constituted reviewing court can do no more than to reverse and remand the matter so that the agency can reconsider the matter free of its original error.[22] What the reviewing court cannot do is to tell the Commission how ultimately it must resolve a question of public policy, as the lower court did here, or to require the agency, as the lower court did here, to order a specific class of interconnections.

The lower court's reliance upon its *Execunet* mandate is fanciful. The interconnection issue was not decided by the Commission in rejecting MCI's Execunet tariff; it was not raised by MCI in its review petition; and it was not briefed by the parties in the lower court in *Execunet* itself. The original *Execunet* decision contains no mention of interconnection except to distinguish *Bell of Pennsylvania* as involving "a very different issue" (561 F.2d at 378 n.59 (Pet. App. 25i)), and the lower court has admitted that the "*Execunet* decision is not addressed explicitly to the interconnection issue or to AT&T's obligation to provide interconnecton . . . ." Slip op. 11 (Pet. App. 10a-11a).[23] Since the *Execunet* decision did not address the interconnection issue, the mandate necessarily

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[22] The principle of *Idaho Power* has been underscored by this Court's action in summarily reversing lower courts which have disregarded the principle and sought to dictate the outcome of agency proceedings. See, *e.g.*, *South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 805-06 (1976); *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966); *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

[23] Indeed, the *Execunet* case had nothing whatever to do with Bell System facilities or obligations. As examination of the decision readily confirms, the decision was concerned solely with MCI's facilities and the existence of conditions limiting their use.

"left the matter open for consideration" on remand and its subsequent resolution by the agency could not violate the mandate. *Perkins* v. *Standard Oil Co.*, 399 U.S. 222, 223 (1970).

Whatever hidden meaning may be attributed to the *Execunet* mandate, the decisive point is that the lower court lacked *power* to dictate the exercise of an administrative function. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). In *Pottsville*, as here, the lower court purported to construe its own prior mandate to require affirmative action by the agency in a matter committed to the agency—there, to grant a broadcast license to an applicant. In reversing, this Court held that however the lower court might choose to read its earlier mandate, the power to grant licenses (under Sections 308-09) was entrusted to the Commission and not to the circuit court. 309 U.S. at 141-46. The reasoning and holding of *Pottsville* apply with equal force to the FCC's power to order interconnection under Section 201(a).

Only recently this Court in *Vermont Yankee* reminded the lower court against procedural decisions that "unjustifiably intrude[ ] into the administrative process" based on policy preferences of the reviewing court.[24] Yet it should be equally plain that reviewing courts must also respect agency power to decide *substantive* policy questions, which lie at the very core of agency expertise and authority. *Vermont Yankee* itself pointed in this direction when it warned

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[24] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 98 S.Ct. 1197, 1218 (1978). See also *FCC* v. *National Citizens Committee for Broadcasting*, 98 S.Ct. 2096, 2111 n.15 (1978).

against procedural requirements which, "under the guise of judicial review," undercut the policy determinations made by Congress. 98 S.Ct. at 1219.

In Section 201(a), Congress determined to entrust to the Commission the power to decide whether and to what extent interconnection should be ordered. When, as here, a lower court summarily tells the Commission that it must order interconnection for switched public message service, the lesson of *Vermont Yankee* has not been understood. This case presents the opportunity for this Court to determine and emphasize that *Vermont Yankee* applies with equal force to *substantive* issues entrusted by Congress to agency resolution.

II. The Lower Court's Decision Directly Conflicts With the Decision of the Third Circuit and Invades the Latter Court's "Exclusive Jurisdiction" Under the Hobbs Act.

In 1974, the Bell System petitioned the Third Circuit under the Hobbs Act, 28 U.S.C. §§ 2341-50, to review the Commission's interconnection orders. Responding to the Bell System's charge that the interconnection orders were unduly vague and overbroad, the Third Circuit found that the history and purpose of the interconnection orders gave them "a definite meaning" far short of an obligation to interconnect for switched public message services:

> "As we read the [*Bell System Tariff Offerings*] order, the FCC has required AT&T to provide to the specialized carriers those (interconnection) elements of *private line* service which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department." 503 F.2d at 1273-74 (Pet. App. 42g) (emphasis added).

This delineation of the interconnection obligation, limiting it to "private line" service, was a *holding* relied on by the Third Circuit to rescue the orders from charges of vagueness and overbreadth.[25] The holding was consistent with, and supported by, the representations of the Commission, the Department of Justice, and the specialized carriers. See MO&O paras. 48-49. (Pet. App. 28c-29c). Since the Commission has never issued any subsequent Section 201(a) order to the Bell System, the Third Circuit's decision definitively establishes the scope of the Bell System's existing interconnection obligations.

The lower court in this case lacked the power under the Hobbs Act to disregard the Third Circuit's decision and extend the Bell System's interconnection obligations to a service found by the Commission to be equivalent to ordinary long distance service.[26] Once the original Bell System petition for review and the record were filed in the Third Circuit, the Hobbs Act conferred on that court "exclusive jurisdiction" over the orders, and the court's determinations were "final" under the statute. 28 U.S.C. §§ 2349, 2350. Construing a parallel statute, this Court clearly held

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[25] Elsewhere in the opinion the Third Circuit characterized the orders as ones that require the Bell System "to furnish to MCI . . . the interconnection facilities necessary to provide *private line* services." 503 F.2d at 1254 (Pet. App. 2g) (footnote omitted) (emphasis added).

[26] The lower court never questioned the FCC's holding that Execunet is plainly a switched public message service equivalent to ordinary long distance service. See slip op. 20 (Pet. App. 19a). That FCC determination is both within the scope of the agency's expertise (*Interstate Broadcasting Co.* v. *FCC*, 265 F.2d 598 (D.C. Cir. 1959)) and is clearly supported by cogent reasoning and determinations. 60 F.C.C.2d at 43-44.

that such judicial review provisions create a "specific, complete and exclusive mode for judicial review" and the resulting decision precludes any "collateral attack upon, and *de novo* litigation between the same parties of issues determined by, the final judgment" of the initial reviewing court. *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 336, 341 (1958).[27]

The "exclusive jurisdiction" provision of the Hobbs Act is designed to avoid conflicts by channeling proceedings to review individual FCC orders into a single court of appeals with authority to issue a "final" determination. When the lower court disregarded the determination on interconnection obligations reached previously by the Third Circuit, it not only conflicted with the Third Circuit but also violated the "exclusive jurisdiction" and finality provisions of the statute.[28] Certiorari is warranted to assure compliance with an important jurisdictional statute allocating authority among reviewing courts.

Moreover, there is a direct conflict between the Third Circuit and the District of Columbia Circuit. The Commission issued interconnection orders in 1973 and, on direct review, the Third Circuit held them to be lim-

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[27] The review statute involved in *Tacoma* is a counterpart to the Hobbs Act. *Compare* Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) (quoted in 357 U.S. at 335), *with* 28 U.S.C. §§ 2349, 2350.

[28] Under the "exclusive jurisdiction" provision, the D.C. Circuit clearly could not have acted on the interconnection orders after the record was filed in the Third Circuit and while the case was awaiting decision. 28 U.S.C. § 2349. Clearly, the Third Circuit's exclusive authority is, if anything, even greater once it has reached a "final" decision.

ited to "private line" service and therefore valid in the face of charges of vagueness and overbreadth. See p. 17, above. In direct conflict, the District of Columbia Circuit has now said that Bell System interconnection obligations, which arise out of the same orders construed by the Third Circuit, extend to a service found by the Commission to be a public switched message service and not a private line service. Slip op. 2-3 (Pet. App. 2a). The agency and the telephone industry cannot obey both circuit courts, and they deserve a definitive resolution of the conflict by this Court.

The decisions create not merely a conflict but a logical impossibility. The Third Circuit made clear that it would have accepted the Bell System's overbreadth argument if the Commission interconnection orders extended beyond private line service. 503 F.2d at 1273 (Pet. App. 42g). The District of Columbia Circuit has now declared that the Bell System is required to provide interconnection for service that is not private line. The District of Columbia Circuit's determination would therefore render the interconnection orders themselves invalid under the Third Circuit's decision, and MCI would be entitled to no interconnection whatever. Such an anomoly virtually requires that one tribunal consider the entire controversy at one time, and confirms the wisdom of both the "exclusive jurisdiction" provision of the Hobbs Act and this Court's *City of Tacoma* decision.

The lower court's attempts to distinguish the prior Third Circuit decision actually underscore the existence of a direct conflict. First, the lower court asserts that the Third Circuit was only required to determine whether the interconnection orders reached the two services initially involved in *Bell of Pennsylvania,* and

therefore—it claims—the question whether the orders reached Execunet remained open. Slip op. 17-19 (Pet. App. 15a-19a). However, in order to sustain the interconnection orders against charges of overbreadth the Third Circuit had to, and did in fact, construe those orders as confined solely to private line service (503 F.2d at 1273-74 (Pet. App. 42g); and the Commission has ruled definitively that Execunet is not a private line service.

Secondly, the lower court suggests that the Commission recognized more recently that interconnection obligations are not necessarily limited to conventional private line services, but extend to all "specialized" interstate services. Slip op. 21 (Pet. App. 20a). Even if this were so, the Commission has explicitly ruled that Execunet is the equivalent of ordinary long distance service. Whatever scope may be given to terms like "private line" and "specialized" service, the Commission has consistently ruled that these concepts do not embrace services, such as Execunet, that are merely replicas of ordinary long distance service.[29]

The very existence of this direct conflict between the circuits reaffirms the need for a determination by this Court on the fundamental issue posed under the Hobbs Act. By ignoring the exclusivity and finality provisions of that statute, the lower court has reached a determination on the scope of FCC orders contrary to that earlier reached by another court of

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[29] It is difficult to conceive of any service less "private" or "specialized" than one that duplicates the essential capabilities of ordinary long distance service. In any case, the FCC's determination that Execunet is not a private or specialized service represents a construction by the Commission of its own technical nomenclature.

appeals, in litigation between the same parties, concerning precisely the same FCC orders. If the plan of judicial review ordained by Congress in the Hobbs Act is to function—and the agency and parties are to be protected against conflicting mandates—then the statutory question of jurisdictional priority posed by this case must be resolved by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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August 1978

78-217
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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August 1978

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, DATA TRANSMISSION COMPANY (DATRAN), AND SOUTHERN PACIFIC COMMUNICATIONS COMPANY
INTERVENORS

Motion for an Order Directing
Compliance With Mandate

Filed April 14, 1978

Michael H. Bader, William J. Byrnes, Kenneth A. Cox, and *Raymond C. Fay* were on the pleadings for petitioners.

Robert R. Bruce, General Counsel, *Daniel M. Armstrong,* Associate General Counsel, and *John E. Ingle,* Counsel, Federal Communications Commission, were on the pleadings for respondents.

Paul J. Berman, Michael Boudin, and *F. Mark Garlinghouse* were on the pleadings for intervenor American Telephone and Telegraph Company.

Before WRIGHT, *Chief Judge,* and TAMM and WILKEY, *Circuit Judges.*

Opinion for the court filed by *Chief Judge* WRIGHT.

WRIGHT, *Chief Judge:* Petitioners here, MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C Inc. (hereinafter, collectively, MCI), request this court to issue an order directing the Federal Communications Commission (FCC) and the American Telephone & Telegraph Company (AT&T) to comply with our mandate in *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, —— U.S. ——, 46 U.S. L. WEEK 3446 (January 16, 1978) (hereinafter *Execunet*). This motion by MCI was prompted by a declaratory ruling issued by the Commission, at the request of AT&T, on Fabruary 23, 1978, holding that AT&T is under "no obligation" to provide the local physical interconnections necessary for MCI's Execunet service.[1] MCI argues that this ruling is inconsistent with and violative of our *Execunet* decision, and that under our mandate AT&T *is* required to provide interconnections for Execunet. For the reasons set forth below, we agree, and we order the parties to comply with our mandate.

I. BACKGROUND

The motion to direct compliance before us now is the most recent stage in the long series of proceedings and litigation in which MCI has attempted to secure and preserve its authority to offer Execunet service.[2] Since the

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[1] *In the Matter of Petition of American Telephone and Telegraph Company for a Declaratory Ruling and Expedited Relief*, FCC 78-142, Memorandum, Opinion and Order, Adopted February 23, 1978, Released February 28, 1978 (hereinafter FCC Declaratory Ruling).

[2] With Execunet a subscriber with a push-button telephone is able to reach any telephone in a distant city served by MCI by dialing a local MCI number followed by an access code and the number in the distant city. Execunet subscribers are billed on a time and distance basis for each call, subject to a monthly minimum. *See MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 367 & n.3 (D.C. Cir. 1977), *cert. denied*, —— U.S. ——, 46 U.S. L. WEEK 3446 (Jan. 16, 1978) (hereinafter *Execunet*); *MCI Telecommunications Corp.*, 60 FCC2d 25, 26 n.1 (July 13, 1976).

seminal FCC *Specialized Common Carrier decision, Specialized Common Carrier Services,* 29 FCC2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Com'n v. FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975) (hereinafter *Specialized Carrier*), MCI has met with almost continuous resistance from AT&T in its efforts to provide communications services. We had thought that this process finally culminated in our *Execunet* decision upholding MCI's authority to offer Execunet pending further rulemaking by the Commission. Now, however, we are faced with a new effort by AT&T, with the approval of the Commission, to arrest the development of Execunet services, and the question for immediate disposition is whether protection of the integrity of our *Execunet* mandate requires that this new effort be terminated through an order directing compliance with our mandate. We believe it does.

Since the course of all of these earlier proceedings is set out in some detail in our *Execunet* decision,[3] our purpose here is only to outline briefly the background necessary to consideration of this motion. In *Specialized Carrier, supra,* the Commission sought to determine by rulemaking "[w]hether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field * * *." 29 FCC2d at 878. The Commission answered that question affirmatively,[4] but did

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[3] *See Execunet, supra* note 2, 561 F.2d at 367-373. *See also Bell Telephone Co. of Pennsylvania v. FCC,* 503 F.2d 1250, 1254-1263 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975).

[4] As to this question the Commission concluded:

> [T]here is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to

not seek to define precisely the boundaries of "the specialized communications field."[5]

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outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

Specialized Common Carrier Services, 29 FCC2d 870, 920 (1971, *aff'd sub nom. Washington Utilities & Transportation Com'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (hereinafter *Specialized Carrier*). The Commission went on to address the question of "the appropriate means for local distribution of the proposed services," *Notice of Proposed Rulemaking*, 24 FCC2d 318 (1970), concluding:

> 157. We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "*where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors.*" In view of the representations of AT&T and GT&E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision.

Specialized Carrier, supra, 29 FCC2d at 940 (emphasis added; footnote omitted).

[5] *See Execunet, supra* note 2, 561 F.2d at 371, 379 n.68 ("to the extent that any definition of a specialized common carrier emerges from the Commission's discussion, that definition appears to be simply that a specialized carrier is any carrier that does not attempt to optimize its service offerings to the voice communications needs of the general public").

Specialized Carrier served as the basis for the Commission's later grants, under 47 U.S.C. § 214 (1970), of facilities authorizations to carriers, including MCI, to provide microwave communications services. AT&T, however, refused to provide interconnections necessary for the specialized carriers to furnish these services. This refusal led MCI to seek and secure from the Commission both a cease and desist order against AT&T and an affirmative order that AT&T was required to provide any physical connections "essential" to the rendition of "all" the services which any of the specialized common carriers "presently or hereafter" are authorized to offer. *Bell System Tariff Offerings*, 46 FCC2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

MCI filed a tariff revision including rates for Execunet service in September 1974. That tariff was rejected by the Commission at the request of AT&T. MCI immediately sought a stay of the Commission's order pending judicial review. A stay was initially granted, then later modified in light of the opposition of the FCC and AT&T. As modified the stay permitted MCI to continue to serve its present customers but prohibited any solicitation of new customers or any expansion of service.[6] In seeking and securing this modification of the stay—as well as in its opposition to the grant of the original stay—AT&T forcefully argued that a broad stay would permit MCI to compete with AT&T's long distance service in high density, high profit areas, and that this would have a substantial adverse impact on AT&T and on the public interest. According to the pleadings filed in this court by AT&T, such competition would undermine AT&T's practice of determining long distance rates through cost averaging and would result in substantial increase in costs in low density areas.[7]

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[6] *See Execunet, supra* note 2, 561 F.2d at 369 & n.18.

[7] *See* Memorandum of AT&T in Opposition to Petitioners' Motion for Stay Pending Review, July 14, 1975, at 44-47; Motion of AT&T

After an initial remand at the Commission's request for further proceedings on the merits, we reversed the FCC's rejection of the Execunet tariff. We held that under the Communications Act the tariff system provides the usual mechanism for initiation of new services to be provided on previously authorized facilities.[8] Under this mechanism a carrier files a tariff for the new service and, subject to a possible stated suspension period, is permitted to implement that service until and unless the Commission determines that the service is not in the public interest.[9] The only limitation on the carrier's ability to make use of tariff filings to initiate new services relevant to this case is found in Section 214(c) of the Act, 47 U.S.C. § 214(c) (1970), which permits the Commission, in granting facilities authorizations, to limit the services which may be provided on facilities which it authorizes.[10]

The Commission argued in *Execunet* that its *Specialized Carrier* decision implicitly restricted the facilities authorizations of specialized carriers to "private line" services, that Execunet is not such a "private line" service, and that MCI therefore could not implement this service through a tariff filing. In support of its position the Commission emphasized that its analysis of competitive effects in *Special-*

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to Dissolve or Modify the Stay and for Expedited Review, August 18, 1976, at 24-29.

[8] *Execunet, supra* note 2, 561 F.2d at 374, *citing AT&T v. FCC*, 487 F.2d 965, 870-881 (2d Cir. 1973).

[9] The relevant tariff provisions are found in §§ 203-205 of the Communication Act, 47 U.S.C. §§ 203-205 (1970). *See Execunet, supra* note 2, 561 F.2d at 374 n.44.

[10] Section 214(c) permits the Commission to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c) (1970). *See Execunet, supra* note 2, 561 F.2d at 376-377 & n.56.

ized Carrier assumed that the specialized carriers would be limited to offering "private line" services.[11]

We rejected the Commission's arguments, holding that Section 214 requires an affirmative determination to restrict a carrier's facilities authorization, and that no such determination was made in *Specialized Carrier*. In reaching our conclusion we placed emphasis on the Commission's staff report which formed the basis for the *Specialized Carrier* decision. As to the competition argument, we found that the staff report "ruminated more broadly [than the Commission suggested] on the issues posed by revenue diversion and it appeared highly skeptical of the validity of AT&T's overall argument." 561 F.2d at 378. Further, we noted that the staff report "dealt explicitly with the question of how the Commission ought to deal with possible adverse impacts of service offerings other than those which were before the Commission in the *Specialized Common Carrier* decision." *Id.* at 378-379. We found that "[t]he undeniable import of the staff's analysis is that questions related to the future impact of specialized carrier service offerings other than those immediately at hand in the *Specialized Common Carrier* case should be resolved in other proceedings—in tariff proceedings, upon license renewal, or by future rulemaking." *Id.* at 379.

AT&T, as well as the Commission, petitioned for certiorari, arguing, *inter alia*, as they had before this court, that our decision would result in vigorous competition over high density routes, with potentially adverse effects on the

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[11] *Execunet, supra* note 2, 561 F.2d at 37 & n.58.

public interest as well as on AT&T.[12] Certiorari was denied on January 16, 1978.[13]

Hours after the Supreme Court's denial of certiorari AT&T announced it's intention to cease providing any additional interconnections for Execunet or similar services, and filed with the Commission a petition for declaratory ruling that it was under "no obligation" to furnish MCI or any other specialized carriers with any "additional" physical connections for Execunet-type services. The Commission considered AT&T's petition on an expedited basis, and on February 23, 1978 it adopted a declaratory ruling in substantial accord with AT&T's request.[14]

II. The Commission's Declaratory Ruling is Inconsistent With the *Execunet* Mandate

The local physical interconnections which AT&T now refuses to provide for Execunet service are admittedly essential to MCI's ability to offer that service. As a result, AT&T's refusal to provide "additional" connections, upheld in the Commission's declaratory ruling, means that MCI is in effect no better off than it was during the entire course of the litigation in this court: notwithstanding our favorable decision, it is unable to expand Execunet. Moreover, nothing in the Commission's ruling, or in AT&T's request, establishes any legal basis for a greater intercon-

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[12] AT&T Petition for Certiorari, *MCI Telecommunications Corp. v. FCC* (Sept. 1977), at 29-30 ("If the lower court's decision stands, the telephone companies will be threatened with a massive diversion of MTS traffic from the switched network. This diversion can occur at an extraordinary rate—literally in a matter of months—because the specialized carriers have thousands of intercity circuits in operation and they utilize existing local distribution facilities already in place. Past experience confirms the severity and speed of this threat."), *quoted in* MCI Petition for Compliance before the FCC, at 7.

[13] —— U.S. ——, 46 U.S. L. Week 3446 (Jan. 16, 1978).

[14] The petition for a declaratory ruling was granted, and AT&T declared without obligation to interconnect, with respect to prior Commission orders, the provisions of the Communications Act, and

nection obligation on AT&T with respect to maintenance of physical connections already in place than with respect to "additional" connections, with the result that MCI might well find itself in the near future unable even to provide Execunet to its existing customers.[15]

Having successfully litigated the question of its right to provide Execunet service, MCI certainly has good cause to feel that this subsequent turn of events engineered by the Commission and AT&T is strikingly unfair. Of course, as AT&T and the Commission so vigorously argue, litigation in the court does not always provide the victor with all that he might wish, or with all that he expected or thought he had won. But the fact of the matter is that our *Execunet* decision *did* clearly contemplate—by virtue of *AT&T's* representations and actions—that AT&T was required to provide interconnections for Execunet service.

Until the Supreme Court denied certiorari in *Execunet*, AT&T provided MCI with the interconnections necessary for Execunet service without any form of protest or objection. Never in the proceedings before this court did AT&T even suggest that it was not required to provide these connections, or that the question of MCI's authority to provide or expand its Execunet service was, as a practical matter, of no consequence since AT&T could and would refuse to provide the essential interconnections should we decide in MCI's favor. Quite to the contrary, in securing the modifi-

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the mandate of this court in *Execunet*. The petition was denied only "insofar as it requests a determination with respect to the scope of petitioner's interconnection obligations to specialized common carriers, if any, under the Sherman Act, the common law, or any federal or state statute other than the Communications Act." FCC Declaratory Ruling, *supra* note 1, ¶ 83.

[15] Indeed, the Commission's order does not even restrict its holding to "additional" connections: it concludes "that our prior Section 201(a) orders do not direct the petitioners to provide interconnection of facilities or services to any specialized common carrier to enable such a specialized common carrier to provide any service which is substantially equivalent to MTS or WATS." *Id.* ¶ 79.

cation of our original stay, in its briefs and arguments to this court, and in its petition for certiorari, AT&T consistently emphasized that a decision in favor of MCI *would* lead to vigorous and adverse competition.[16]—a result which would occur only if AT&T was required to provide the necessary interconnections for Execunet. AT&T expected and encouraged this court to take account of these representations in reaching our decisions in the Execunet matter; certainly, it did not assume that in so doing we would at the same time ignore the underlying assumptions supporting the claims of competition. Indeed, even now AT&T does not deny that it is required to provide interconnections for existing Execunet service; it contends *only* that it is not required to provide any "additional" connections,[17] notwithstanding its earlier representations necessarily assuming the contrary, upon which our *Execunet* decisions were premised, as well as the absence of any apparent legal basis for distinguishing existing connections from additional ones.

In view of this background, AT&T's current refusal, with the approval of the Commission, to provide interconnections to MCI does not simply raise questions for fairness *vis-a-vis* MCI; it also raises questions as to the propriety of allowing respondents here to renounce a position and obligation which they assumed throughout the course of the *Execunet* proceedings. But we need not rest our grant of MCI's compliance motion on the practical consequences involved here or on considerations of fairness and estoppel. For while it is true, as AT&T strongly emphasizes, that our *Execunet* decision is not addressed explicitly to the interconnection issue or to AT&T's obligation to provide inter-

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[16] *See* notes 7 & 12 *supra*.

[17] *See* Opposition of AT&T to MCI Motion for an Order Directing Compliance With Mandate, *MCI Telecommunications Corp. v. FCC* (March 2, 1978), at 10.

connection [18]—a fact which is hardly surprising, given the background of this case and the apparent assumption by all the parties, as well as this court, that such an obligation was in force—it is also true that our analysis and decision of the *Execunet* case is plainly inconsistent with the analysis and ruling of the Commission on February 23, 1978 holding AT&T under "no obligation" to provide interconnections for Execunet.

In reaching this conclusion the Commission addressed its analysis to two questions: whether the Commission had previously directed AT&T to provide these services pursuant to an order under Section 201(a) of the Communications Act; and, if not, whether AT&T is under an obligation to provide interconnection apart from a Section 201(a) order. While serious questions have been raised by the Department of Justice as to the correctness of the Commission's disposition of the second question,[19] we need not address these doubts here, since it is the Commission's analysis and resolution of the first question which gives rise to the inconsistency with our *Execunet* mandate. For in concluding that its prior orders do not require AT&T to provide interconnections for Execunet, the Commission construes narrowly and restrictively the very same issues and decisions which were broadly construed by this court in *Execunet*.

For purposes of the Commission's first question, the critical interconnection order is the *Bell System Tariff*

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[18] *See id.* at 12-14. *See also* Response of Federal Communications Commission to MCI Motion for an Order Directing Compliance With Mandate, *MCI Telecommunications Corp. v. FCC* (March 6, 1978), at 7 ("There was no mention of interconnection rights or obligations, because none of the parties had raised these questions either before the Commission or in the Court.").

[19] *See* Comments of the United States Department of Justice, *In the Matter of Petition of American Telephone and Telegraph Company for Declaratory Ruling and Expedited Relief*, submitted as Appendix A to MCI Reply to Oppositions, *MCI Telecommunications Corp. v. FCC* (March 9, 1978), at 7, 9 (arguing, *inter alia*,

Offerings order, *supra,* requiring AT&T to provide interconnection for "all" of the services which any of the specialized carriers "presently or hereafter" are authorized to offer. In its declaratory ruling the Commission sought to construe this order as limited to "presently or hereafter authorized *private line* service," *In the Matter of Petition of AT&T for Declaratory Ruling and Expedited Relief,* FCC 78-142, Memorandum, Opinion and Order, Adopted February 23, 1978, Released February 28, 1978, ¶ 58 (hereinafter FCC Declaratory Ruling), allegedly relying on a decision of the Third Circuit to that effect. *See infra.* In the very next paragraph of its decision, however, the Commission recognized "that the *Specialized Carrier* decision encompassed specialized communication services other than those which theretofore had been described as 'private line services'" and acknowledged that "private line" had emerged as shorthand for the broader term "specialized communication service" because of the particular context in which the interconnections issues were most frequently raised. *Id.* ¶ 259. Thus the Commission continued:

> We believe it is clear that the *Specialized Common Carrier* decision as well as our order in *Bell System Tariff Offerings* and the Court's decision in *Bell Tel. Co. of Pennsylvania* require interconnection for all *specialized* interstate communication services, including switched digital services such as those developed by Datran. What is germane to the present proceeding, however, is a determination as to what services were explicitly *excluded* from consideration in *Specialized Common Carrier, Bell System Tariff Offerings,* and *Bell Tel. Co. of Pennsylvania.* We believe it is

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that "AT&T totally failed to make any factual showing of harm in its petition seeking to invoke Commission protection against competition in the intercity services market," as well as that "[r]ecent court decisions make it clear that local telephone companies, including AT&T subsidiaries, are affirmatively obliged to offer local interconnection or loop services to other carriers, including MCI, to facilitate lawful services").

> clear that MTS and WATS services, and therefore services by other names which are the functional equivalent of MTS and WATS, were excluded from both the considerations and holdings of these proceedings. * * *

Id. (emphasis in original). Phrased in these terms the Commission's reasoning is wholly at odds with that of this court in *Execunet*. For in *Execunet* we held that MCI's facilities authorizations encompassed Execunet service *precisely because Specialized Carrier did not explicitly and affirmatively exclude this type of service from consideration.* In relying on exactly the opposite conclusion to support its declaratory ruling, the Commission acts in direct and explicit contradition to our *Execunet* decision.

The inconsistency between *Execunet* and the Commission's declaratory ruling persists at the more general level as well. The thrust of our entire option and decision in *Execunet,* derived in part from our reading of the Commission staff report, was that *Specialized Carrier* represented a broad decision by the Commission to allow carriers such as MCI to enter the market and compete with AT&T, subject only to later limitations based on public interest determinations in tariff or rulemaking proceedings.[20] In its February 23rd ruling, however, the Commission narrowly construed *Bell System Tariff Offerings,* which was based on *Specialized Carrier,* to exclude Execunet interconnections from those which AT&T was required to provide; and it relied on interconnection obligations—as opposed to tariffs or rulemaking—effectively to limit the services which MCI and other carriers were authorized to provide by the *Specialized Carrier* decision.

Both of these positions are clearly inconsistent with the basic themes of our *Execunet* decision. For the expansive interpretation of *Specialized Carrier* we advanced in *Execunet* clearly mandates an equally expansive view of the scope of the interconnection obligations of AT&T which

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[20] *Execunet, supra* note 2, 561 F.2d at 378-379. *See* pp. 7-8 *supra.*

were defined by that decision. And in fact the interconnection order which the Commission issued on the basis of *Specialized Carrier*, as well as its discussion of interconnection in *Specialized Carrier* itself,[21] reflected the broad reading of that decision to which we have adhered: as noted earlier, it required AT&T to furnish interconnection for all "presently or hereafter authorized" services provided by the specialized carriers.[22] Similarly, our emphasis on tariffs and ratemaking as the exclusive means for future limitations on the specialized carriers' development[23] clearly contemplated that the carriers would be free to expand their service offerings—and would be afforded the necessary interconnections—until and unless it was found that the public interest demanded otherwise. The Commission's narrow construction of AT&T's existing interconnection obligation is not only theoretically inconsistent with this position, but also means in practice that a specialized carrier *cannot* implement new offerings until and unless it is able to establish that the public interest mandates the services[24] and that a new order

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[21] *See* note 4 *supra*, *quoting Specialized Carrier*, 29 FCC2d at 940 ("established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier").

[22] *Bell System Tariff Offerings*, 46 FCC2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pennsylvania v. FCC*, *supra* note 3.

[23] *Execunet*, *supra* note 2, 561 F.2d at 378-379. *See* pp. 6-8 *supra*.

[24] *Compare Execunet*, *supra* note 2, 561 F.2d at 374 ("it is well recognized that the tariff provisions of the Communications Act (Sections 203-205, 47 U.S.C. §§ 203-205), like the cognate sections of the Interstate Commerce Act • • •, embody a considered legislative judgment that carriers should in general be free to initiate and *implement* new rates or services over existing communications lines unless and until the Commission, after hearing, determines that such rates or practices are unlawful, subject only to a limited period of suspension set out in the statute") (footnotes omitted; emphasis in original).

should therefore be issued directing AT&T to provide interconnections. This twists the issues we contemplated in this case beyond recognition; it deliberately frustrates the purpose of the litigation, the basis on which it was presented by the parties, and the intended effect of our decree.

In our view, then, the only conclusion to the issues presented here which is consistent with our reasoning and holding in *Execunet* is that the Commission decisions in *Specialized Carrier* and *Bell System Tariff Offerings* impose upon AT&T an obligation to provide interconnections for Execunet. In holding otherwise in its February 23rd declaratory ruling, therefore, the Commission acted inconsistently with our *Execunet* mandate. And in refusing to provide these interconnections to MCI, AT&T is acting inconsistently with the view of its legal obligations reflected in our *Execunet* decision.

III. The *Bell Telephone* Decision

One final argument remains to be addressed. The Commission has asserted that the position it has taken in this action is mandated by the decision of the Third Circuit in *Bell Telephone Co. of Pennsylvania v. FCC, supra,* and that this position represents the only means by which the Commission can simultaneously comply with the decisions of the two circuits.[25] As we have already made clear, however, the Commission's February 23rd decision does not effectuate compliance with our *Execunet* decision. Nor can the Commission claim that it was required to decide as it did in order to comply with *Bell Telephone*. For in our view there is absolutely no conflict between the *Execunet* and *Bell Telephone* decisions; the latter in no way compels or even provides support for the Commission ruling that AT&T is under no obligation to provide interconnections for Execunet.

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[25] *See* FCC Declaratory Ruling, *supra* note 1, ¶¶ 56, 61; Response of Federal Communications Commission, *supra* note 18, at 20.

The interconnection orders under review in *Bell Telephone* were issued by the Commission after AT&T refused to provide to MCI the interconnections necessary for FX and CCSA service.[26] FX, a service similar to though somewhat more limited than Execunet, allows an individual in one state in effect to maintain a local phone in another state and thereby avoid making or receiving traditional long distance calls from that state. For example, an individual in Washington with FX can be reached by telephone subscribers in New York City and can himself reach New York City subscribers through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area. CCSA, a Common Control Switching Arrangement, serves to link the various offices of a large company through switches on a local telephone company's premises.[27] In the orders being challenged in *Bell Telephone* the Commission had first concluded that its prior actions—notably, its *Specialized Carrier* decision—had imposed upon AT&T the obligation to provide FX and CCSA interconnections to MCI and other specialized carriers.[28] Lest its prior orders were not clear, however, the Commission again reviewed the interconnection question, concluding that "achievement of our objective that competition in the provision of interstate private line communications services be on a full, fair and nondiscriminatory basis requires the

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[26] *See Bell Telephone Co. of Pennsylvania v. FCC, supra* note 3, 503 F.2d at 1254-1259.

[27] *Id.* at 1254 n.4, quoting *Bell System Tariff Offerings, supra* note 22, 46 FCC2d at 418 & n.5.

[28] *Bell System Tariff Offerings, supra* note 22, 46 FCC2d at 426-427. *See also* Letter from Bernard Straussburg, Chief of the Common Carrier Bureau, FCC, to AT&T, August 31, 1973 ("it is our view that, as requested by MCI, the associated Bell companies are required to permit interconnection or provide local channel arrangements to MCI"), *quoted in Bell Telephone Co. of Pennsylvania v. FCC, supra* note 3, 503 F.2d at 1256.

issuance of *broad interconnection* orders. Our orders herein therefore make clear that Bell is to provide interconnections for *all of the authorized services of the specialized carriers,* including FX and CCSA." 503 F.2d at 1259, *quoting* 46 FCC2d at 426-427 (emphasis added).

An essential question posed by AT&T's petition for review in *Bell Telephone* was whether the Commission's order was the first time that AT&T had been directed to provide FX and CCSA interconnections, or whether, as the Commission argued, AT&T's obligations to provide these connections were fixed by *Specialized Carrier* and the *Bell Telephone* orders merely represented the Commission's method of enforcing a previously announced mandate.[29] The Third Circuit adopted the Commission's view. The court noted that *Specialized Carrier* contained no specific reference to FX or CCSA, but it construed that decision broadly to include the services in question.[30] In so doing the Third Circuit decision provides strong support—not conflicting authority—for the similarly broad construction we accorded in *Execunet* to *Specialized Carrier* and to the Commission's *Bell Telephone* order. For just as the Third Circuit found *Specialized Carrier* sufficiently broad to include FX and CCSA service, notwithstanding the absence of specific references to these services, so too we have found that decision broad enough to encompass Execunet, notwithstanding the similar absence of specific references.[31]

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[29] *Bell Telephone Co. of Pennsylvania v. FCC, supra* note 3, 503 F.2d at 1259.

[30] *Id.* at 1258-1260. In so doing the court emphasized the broad language the Commission itself employed in the *Specialized Carrier* proceeding. *Id.* at 1262-1263. *See* note 4 *supra,* quoting *Specialized Carrier,* 29 FCC2d at 940; *Execunet, supra* note 2, 561 F.2d at 378-379.

[31] Indeed, one of AT&T's stronger arguments against the *Bell Telephone* result is directly supportive of the result we reach here. In arguing that FX and CCSA should not be considered within

Nonetheless, AT&T and the Commission, pointing to the Third Circuit's discussion of an overbreadth challenge, argue that that discussion forecloses the FCC from finding that AT&T is required to interconnect for Execunet under the *Specialized Carrier* and *Bell Telephone* orders.[32] We disagree. In *Bell Telephone* AT&T argued, *inter alia*, that the order under review, by requiring it to provide "the interconnection facilities essential to the rendition of all of [the specialized carriers'] presently or hereafter authorized interstate and foreign communications services," 503 F.2d at 1283, imposed an *"unbounded* interconnection order." *Id.* at 1273 (emphasis in original). The court rejected this challenge and upheld the order, noting:

> Were we to read the Commission's order in a vacuum, we would be inclined to agree with petitioner that the order is somewhat vague and, to a certain extent, overbroad. On its face, the order gives little guidance as to the types of services that AT&T will be required to provide "hereafter."

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the scope of *Specialized Carrier*, AT&T emphasized that FX and CCSA services were already being provided at the time by AT&T and independent carriers, and that the FCC in *Specialized Carrier* was "contemplating other, more unique services." 561 F.2d at 1262. The Third Circuit did not find this dispositive, concluding that "[w]hile there is language in [*Specialized Carrier*] indicating a concern with new, customized services, we interpret this language as referring not only to types of services provided, but also to the delivery of private line services to ultimate customers who theretofore had been unable to obtain private line services fashioned to their particular needs." *Id.* We need only point out that to the extent both AT&T and the Third Circuit recognized in *Specialized Carrier* a concern with and an interest in encouraging "new, customized service," that is a recognition which we share in finding that decision dispositive of MCI's right—in theory and in practice—to provide Execunet.

[32] *See* FCC Declaratory Ruling, *supra* note 1, ¶ 58; Response of Federal Communications Commission, *supra* note 18, at 10-11, 20; AT&T Opposition, *supra* note 17, at 19.

> Nevertheless, we find it unnecessary to remand on this ground. Orders are not to be read in a vacuum, but rather must be read and interpreted in the context in which they appear. • • • Viewed in its entirely, the FCC's opinion in Docket 19896 operates to preclude AT&T from treating its Long Lines Department and its affiliates differently than it treats the specialized common carriers. • • • As we read the order, the FCC has required A T & T to provide to the specialized carriers those (interconnection) elements of private line services which A T & T supplies to its affiliates and furnishes to customers through its Long Lines Department. • • •

Id. at 1273-1274.

The question presented by the arguments of the FCC and AT&T here is whether the above paragraphs clearly limit the *Bell Telephone* interconnection order so as to exclude Execunet, which the Commission has determined is not a "private line" service.[33] In concluding that it does not, we think two factors are of importance. First, the overbreadth and vagueness with which the Third Circuit was concerned were directed not to any uncertainty as to wha[t] services the specialized common carriers themselves would provide, but rather to the fact that "[o]n its face, the order gives little guidance as to *the types of services that AT&T will be required to provide* 'hereafter.'" *Id.* (emphasis added). Such concerns are not involved in this case, however, since Execunet apparently does not call for any novel forms of service from AT&T, but rather requires virtually the same forms of interconnection as are provided for FX.[34] Second, and more important, the Commission itself has not found or suggested

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[33] FCC Declaratory Ruling, *supra* note 1, ¶ 53, quoting *MCI Telecommunications Corp.*, 60 FCC2d 25, 63 (1976).

[34] *See* MCI Reply to Oppositions, *supra* note 19, at 14.

that the court's *Bell Telephone* decision in fact limits AT&T's interconnection obligations to "private line" services, as that term is currently defined by the Commission. Rather, the Commission, notwithstanding its emphasis on the Third Circuit's use of the term "private line" as a limiting factor in its decision, itself recognizes that *Bell Telephone* imposes upon AT&T an obligation to provide interconnection for services not traditionally considered "private line"—and that it did so at the time it was entered. To quote the Commission once again: "We believe it is clear that the *Specialized Common Carrier* decision as well as our order in *Bell System Tariff Offerings* and the Court's decision in *Bell Tel. Co. of Pennsylvania* require interconnection for all *specialized* interstate communication services • • •." FCC Declaratory Ruling, *supra,* at ¶ 59 (emphasis in original). Having made this determination, and having explained the Third Circuit's use of "private line" as a shorthand or abbreviated term, the Commission then formulates the final and dispositive question for resolution as that of "what services were explicitly *excluded* from consideration in *Specialized Common Carrier, Bell System Tariff Offerings,* and *Bell Tel. Co. of Pennsylvania.*" *Id.* (emphasis in original). And that is precisely the question we addressed and answered in *Execunet,* finding that Execunet services were *not* explicitly excluded.

The Commission's analysis of *Bell Telephone,* then, far from providing authority which conflicts with our construction of the *Execunet* decision, culminates finally in the very question which was not addressed in *Bell Telephone* but which was answered in *Execunet.* Neither the Commission nor AT&T is now free to choose to ignore the answer given by this court, in lieu of one more favorable to their position we rejected in *Execunet.*

Motion granted.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 75-1635

MCI Telecommunications Corporation,
Microwave Communications, Inc.
N-Triple-C Inc., Petitioners

v.

Federal Communications Commission and
United States of America, Respondents

American Telephone and Telegraph Co., *et al.*,
Intervenors

Before: WRIGHT, Chief Judge, and TAMM and WILKEY, Circuit Judges.

(FILED MAY 11, 1978)

Order

Intervenor United States Independent Telephone Association has filed a motion for a further stay of this court's order of April 14, 1978. For the reasons stated in the attached *per curiam,* it is ORDERED that that motion is hereby denied.

Intervenor American Telephone and Telegraph Company has filed a motion for a temporary stay of this court's order of April 14, 1978 until May 12, 1978, to permit application to the Chief Justice of the United States. It is ORDERED that the motion of intervenor American Telephone and Telegraph Company is hereby granted.

It is FURTHER ORDERED that if the application is made at or before noon on May 12, 1978 the stay is extended until the Chief Justice Acts.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

PER CURIAM: The United States Independent Telephone Association (USITA), an intervenor in this action, has filed with this court a petition for a stay of the panel's unanimous decision of April 14, 1978 granting MCI Telecommunications Corporation's motion for an order directing compliance with our mandate in *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, —— U.S. ——, 46 U.S. L. WEEK 3446 (Jan. 16, 1978) (*Execunet I*). *See MCI Telecommunications Corp.* v. *FCC*, —— F.2d —— (D.C. Cir. No. 76-1635), decided April 14, 1978) (*Execunet II*). In seeking a stay USITA raises again the very same arguments unanimously rejected by this panel in *Execunet I*, which the Supreme Court declined to review, in *Execunet II*, and in the petitions for rehearing. These same arguments were raised as well in the suggestions for rehearing *en banc* filed by the Commission, AT&T, and USITA, which led not one judge on this court to request a vote on *en banc* consideration. *See* Rule 35(b), FED. R. APP. P. It is our view that this case has been amply litigated, and that the time has come for enforcement of our original mandate in *Execunet I*. USITA has not "made a substantial case on the merits," *Washington Metropolitan Area Transit Com'n* v. *Holiday Tours, Inc.*, 599 F.2d 841 (D.C. Cir. 1977), nor has it demonstrated that there will be irreparable injury without a stay, or that a stay is necessary to serve the public interest and will not substantially harm the opposing parties in this

proceeding,[1] *id.; Virginia Petroleum Jobbers Ass'n* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958). We therefore deny the petition for a further stay. In order to allow AT&T to seek a stay from the Circuit Justice, however, we hereby grant its motion for a temporary stay. But lest there be any confusion as to our views, we hereby set forth briefly, hopefully for the last time, the issues at stake in this case and the reasons why we believe the arguments raised once again here to be wholly without merit.

I

The background of these proceedings is detailed at length in both the original opinion, *Execunet I, supra,* 561 F.2d at 367-373, and our recent opinion granting MCI's motion, *Execunet II, supra,* slip op. at 4-9. What is involved is MCI's provision of Execunet service, whereby a subscriber making use of local AT&T-furnished interconnections at both ends of an MCI-furnished interstate line can reach any telephone in a distant city served by the MCI line. In the proceedings under review in *Execunet I* the Commission rejected MCI's tariff for Execunet service on the ground that its earlier decisions establishing the scope of MCI's facilities authorizations—notably the *Specialized Carrier* decision, *Specialized Common Carrier Services,* 29 FCC2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Com'n* v. *FCC,* 513 F.2d 1142 (9th Cir.), *cert.*

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[1] Indeed, the Department of Justice, in opposing the FCC's grant of AT&T's petition for a declaratory ruling which led to our Execunet II decision, emphasized that "AT&T totally failed to make any factual showing of harm in its petition to invoke Commission protection against competition in the intercity services market." *See* Comments of the United States Department of Justice, *In the Matter of Petition of American Telephone and Telegraph Company for Declaratory Ruling and Expedited Relief,* submitted as Appendix A to MCI Reply to Oppositions, *MCI Telecommunications Corp. v. FCC* (March 9, 1978), at 7. AT&T and the FCC have yet to make such a showing, or to demonstrate in any way that the public interest would be adversely affected by expansion of Execunet service.

denied, 423 U.S. 836 (1975)—did not encompass Execunet-type services. This court reversed unanimously, holding that MCI did have authority to provide Execunet service. We found that an affirmative determination to exclude certain services is necessary to restrict a carrier's facilities authorization, and that no such determination had been made in *Specialized Carrier*. In reaching this determination this court broadly construed the scope of the *Specialized Carrier* decision and emphasized that that decision contemplated rulemaking and tariff review according to public interest standards as the exclusive mechanisms for imposing future controls on the development of specialized carriers such as MCI.

Certiorari was denied in *Execunet I* on January 16, 1978. On the same day AT&T filed with the Commission a petition for a declaratory ruling that it was under no obligation to furnish the local connections necessary for MCI's provision of Execunet service. The Commission responded by issuing a declaratory ruling to that effect on February 23, leading MCI to request that this court grant a motion directing the FCC and AT&T to comply with the *Execunet I* mandate. Since the Commission's declaratory ruling undermined our *Execunet I* mandate, on April 14, 1978 we granted the motion directing compliance.

Our grant of MCI's motion for compliance was based on the clear and intentional inconsistency of the Commission's February 23 declaratory ruling with our opinion and decision in *Execunet I*. In its declaratory ruling the Commission framed the critical question as "a determination as to what services were explicitly *excluded* from consideration" in its earlier decisions, and concluded that Execunet service was so excluded. FCC Declaratory Ruling ¶ 59 (emphasis in original). That is precisely the question, however, which was presented and determined—in directly contradictory fashion—by this Court in *Execunet I*. In relying on the opposite conclusion to support its declaratory ruling

the Commission, we found, had acted in "direct and explicit contradiction" to our *Execunet I* mandate. *Execunet II, supra,* slip op. at 14. In addition, we found the Commission's interpretation of *Specialized Carrier* and its reliance on interconnection obligations effectively to limit the service offerings of MCI to be directly at odds with the basic themes of our *Execunet I* decision: "that *Specialized Carrier* represented a broad decision by the Commission to allow carriers such as MCI to enter the market and compete with AT&T, subject only to later limitations based on public interest determinations in tariff or rulemaking proceedings." *Id.* Finally, we addressed and rejected the argument that the Commission's position in its declaratory ruling was mandated by the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania* v. *FCC,* 503 F.2d 1250 (3rd Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975), finding our decision to be wholly consistent with—and indeed deriving support from—that reached by the Third Circuit in *Bell Telephone.*

Subsequently, we granted a stay of our order pending disposition of the petitions for rehearing and suggestions for rehearing *en banc* to afford the Commission and AT&T the fullest opportunity to press their claim. Extensive petitions for rehearing and suggestions for rehearing *en banc* were then filed by the FCC and AT&T, as well as by USITA. We unanimously denied the petitions for rehearing on May 8, 1978. Rehearing *en banc* was denied on the same day, with no judge on this court having requested a vote on the suggestions. *See* Rule 35(b), FED. R. APP. P.

II

In seeking a stay of our order, USITA continues to stress the two points which have been emphasized throughout these proceedings: that the interconnection obligation of AT&T was neither mentioned nor addressed in *Execunet I,* and that *Execunet II* is inconsistent with the Third Cir-

cuit's decision in *Bell Telephone Co. of Pennsylvania* v. *FCC, supra.*

As to the first point, the fact is that until the Supreme Court denied certiorari in *Execunet I* AT&T provided the interconnections necessary for Execunet service without any form of protest or objection. The obligation of AT&T as a common carrier to provide the necessary interconnections was conceded all through the *Execunet I* proceedings, and they were indeed so provided. In securing the modification of our original stay of the Commission's ruling in *Execunet I*, in its briefs and arguments to this court, and in its petition for certiorari, AT&T repeatedly and consistently stressed that a decision in favor of MCI *would* lead to further expansion and vigorous and adverse competition—a result which could occur only if AT&T was required to provide the necessary interconnections. It was only after the Supreme Court's denial of certiorari—and only a few hours afterwards, at that—that AT&T claimed for the first time that it was not required to provide interconnection for Execunet service. It was thus that we concluded in *Execunet II* that our decision in *Execunet I*, consistent with AT&T's representations during those proceedings, clearly contemplated that AT&T was and is required to provide interconnection for Execunet service. Slip op. at 10. Nonetheless, our grant of MCI's motion was not based on any abstract contemplation of the court, let alone on the private intentions of the members of the panel. *See* AT&T Petition for Rehearing at 11. Rather, it was grounded on the very clear and concrete contradictions between the court's reasoning, interpretations, and conclusions in *Execunet I* and those of the Commission in its declaratory ruling. The fact that interconnection obligations were not specifically addressed in *Execunet I* because they were assumed by the parties hardly eliminates these contraditions; if anything, it provides further support for the grant of MCI's motion to direct compliance with this court's mandate.

The argument for a further stay of our mandate based on the alleged inconsistency with *Bell Telephone* is, we think, no more persuasive. Indeed, in *Bell Telephone* the court held that AT&T was required to provide interconnection for services similar to though somewhat more limited than Execunet. The court reached this conclusion by broadly construing the Commission's *Specialized Carrier* decision to include the services in question, notwithstanding the absence of any explicit mention of them in the Commission decision—just as we have construed *Specialized Carrier* to encompass Execunet service notwithstanding the similar absence of specific references. Certainly, no one could argue that a decision by one court that AT&T is required to provide interconnection for one service forecloses a subsequent decision that AT&T is also required to provide interconnection for a similar service which makes use of identical forms of interconnection.

There is, then, absolutely no inconsistency between the holdings of *Bell Telephone* and *Execunet I* and *II*. The only inconsistency even asserted derives instead from the Third Circuit's reasoning in rejecting AT&T's argument that the interconnection order under review in *Bell Telephone*, which required AT&T to provide interconnections "essential to the rendition of all of [the specialized carriers'] presently or hereafter authorized interstate and foreign communications services," imposed an "*unbounded*" and illegal interconnection obligation. *Bell Telephone, supra*, 503 F.2d at 1273, 1283. In response the court noted that while the order on its face gave little guidance as to the types of services that AT&T will be required to provide "hereafter," when read in context "the FCC has required AT&T to provide to the specialized carriers those interconnection elements of private line services which AT&T supplies its affiliates and furnishes to customers through its Long Lines Department." *Id.* at 1273-1274. Relying on this statement, AT&T argues that its interconnection obligations are limited by the Third Circuit decision to "private line" services and that Execunet is not such a service.

But as the FCC has recognized in its declaratory ruling, the Third Circuit's use of the term "private line" cannot be interpreted to limit the interconnection obligations arising from *Specialized Carrier* to "private line services" as that term is currently defined. Rather, the Commission has explained the court's use of the term as a shorthand or abbreviated expression encompassing a broader range of services than that which the Commission currently defines as private line services. *See* FCC Declaratory Ruling, *supra,* at ¶ 59; *Execunet II, supra,* slip op. at 21. The relevant question, then, according to the Commission itself, is what services were explicitly excluded from consideration in *Specialized Carrier* and the decisions which followed it. The *Bell Telephone* case answered this question with respect to the services at issue in that case, but it did not address it, let alone answer it, with respect to Execunet services. That was the issue we addressed and decided in *Execunet I.* And it is the Commission's rejection of the answer we provided in *Execunet I* which necessitated our grant of MCI's motion to direct compliance.

III

Only one point remains to be addressed. USITA emphasizes, as did the Commission and AT&T in their suggestions for rehearing *en banc,* that it is the responsibility of the Commission to determine whether competition by services such as Execunet is in the public interest. With that point we are in complete agreement. Recognition of the Commission's public interest responsibilities, however, provides no basis for upholding its February 23 declaratory ruling in view of the clear inconsistencies with the *Execunet* case. For the Commission's declaratory ruling was *not* based on considerations of the public interest, and it in no way reflected a Commission decision that expansion of Execunet service would adversely affect the public interest. Rather, it reflected only the Commission's interpretation of the statutory provisions of the Communications Act and of

earlier decisions rendered by the Commission, the Third Circuit, and, most importantly, this court in *Execunet I*. Indeed, it was the Commission's prohibition of Execunet service without any consideration of the public interest in the first instance which led to this long series of litigation.

The Commission has now commenced inquiry into the broad questions of competition and the public interest posed by the development of services such as Execunet. That inquiry is one which we welcome. How long it takes is another question. But its existence does not justify allowing AT&T to maintain its *de facto* monopoly pending any final rules where this court has held, in a full proceeding between these parties, that consideration of the provisions of the Communications Act and of the relevant agency and judicial precedents establishes MCI's right to enter the market now.[2]

The decisions reached by this court have been informed by full briefing and argument in *Execunet I* and by voluminous submissions by the parties in *Execunet II*. The parties have been afforded ample opportunities to present their positions to this court, and to the Supreme Court in their petitions for review of *Execunet I*. Our decision in *Execunet II* simply enforces the mandate of *Execunet I*, which the Supreme Court chose not to review.

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[2] Indeed, FCC Commissioner Joseph R. Fogarty, who dissented from both the Commission's declaratory ruling in favor of AT&T and its decision to seek a stay and rehearing by this court, stated: "I believe it is improper and counterproductive to continue this litigation any further, following two reversals by the Court of Appeals and denial of Review by the Supreme Court. Enough is enough. I would devote all available resources of this Commission to expedite determination of a reasonable competitive market structure for domestic telecommunications services." Statement of Commissioner Joseph R. Fogarty, In re Motion for a Stay of the United States Court of Appeals Order Directing Compliance with Execunet *Mandate*, submitted as Attachment A to MCI Oppositions to Stay, at 1.

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 78-142
97470

IN THE MATTER OF

PETITION OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY FOR A DECLARATORY RULING AND EXPEDITED RELIEF

Memorandum, Opinion and Order

Adopted: February 23, 1978; Released: February 28, 1978

By the Commission: Chairman Ferris issuing a separate statement; Commissioner Fogarty dissenting and issuing a statement.

1. We have before us a "Petition for a Declaratory Ruling and Expedited Relief" filed on January 16, 1978 by the American Telephone and Telegraph Company (AT&T).[1] That petition stated that AT&T will not provide any additional connections to local exchange services to "Other Common Carriers" for their use in the provision of service offerings which are not private line services and that AT&T believes such a course of conduct does not violate the cease and desist order in *Bell System Tariff Offerings*, 46 FCC 2d

[1] That petition has been styled as "In the Matters of BELL SYSTEM TARIFF OFFERINGS of Local Distribution Facilities for Use by Other Common Carriers; and Letter of Chief, Common Carrier Bureau, dated October 19, 1973, to Laurence E. Harris, Vice President MCI Telecommunications Corporation, FCC Docket No. 19896." Inasmuch as Docket No. 19896 has been terminated for more than two years, the petition should have been styled as a new proceeding. The petition and all comments or other pleadings relating to this petition will be filed in the instant proceeding, which shall be considered as separate and distinct from the terminated Docket 19896 proceeding.

413 (1974), affirmed *sub nom. Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). The petition requested that we issue a declaratory ruling affirming that AT&T has "no present obligation to provide additional connections to local exchange service to Other Common Carriers ("OCCs") for their use in the provision of service offerings which are not private line services."[2]

2. Oppositions to AT&T's request for such a declaratory ruling have been filed by MCI Telecommunications Corporation (MCI), Southern Pacific Communications Company (SPC), Satellite Business Systems (SBS), American Satellite Corporation (ASC), Telenet Communications Corporation (Telenet), Aeronautical Radio, Inc. (ARINC) and the United States Department of Justice. Comments in support of AT&T's position have been filed by Continental Telephone Corporation (Continental), GTE Service Cor-

[2] The petition does not define "Other Common Carriers." However, inasmuch as the *Bell System Tariff Offerings* cease and desist order was issued for the purpose of clarifying and enforcing AT&T's obligation to interconnect with specialized common carriers pursuant to our decision in *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971), affirmed *sub nom. Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), the term "Other Common Carriers" in the AT&T petition appears to be synonymous with the term "specialized common carriers" in the *Bell System Tariff Offerings* order which directed AT&T to furnish certain interconnection facilities to "specialized common carriers." AT&T's Reply Comments confirm that the petition does not relate to international record carriers or value-added carriers who are authorized to provide only non-voice services. Neither the petition nor the reply comments indicate that AT&T contemplates any change in interconnection arrangements with Western Union or the independent telephone companies. Accordingly, the discussion and decision herein relates only to interconnection arrangements between telephone companies and specialized common carriers and not to such arrangements between and among telephone companies, or between telephone companies and Western Union, international record carriers, or value-added carriers.

poration (GTE), and the United States Independent Telephone Association (USITA). In addition, the following parties have filed comments regarding AT&T's petition as it relates to their individual circumstances, but have taken no formal position before the Commission; Association of Data Processing Service Organizations, Inc. (ADAPSO), Graphnet Systems Inc. (Graphnet), Computer and Business Equipment Manufacturers Association (CBEMA), Western Union International, Inc. (WUI), ITT World Communications, Inc. (ITT Worldcom), and RCA Global Communications, Inc. (RCA Globcom). Additional reply comments have been filed by AT&T, MCI, USITA, GTE and Continental.

I. CONTENTIONS OF THE PARTIES

A. *Contentions of AT&T*

3. AT&T begins by stating that its interpretation of the recent Court of Appeals decision in *MCI Telecommunications Corp.* v. *FCC ("Execunet")*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, No. 77-420, 46 U.S.L.W. 3448 (January 16, 1978), is that the Court ruled that our *Specialized Common Carrier* decision, *supra*, did not limit Other Common Carriers to providing only private line services over their existing facilities. AT&T states that it does not dispute that holding for purposes of this proceeding. However, AT&T contends that the *Execunet* decision did not alter the Commission's finding that MCI's Execunet service and other similar services are not private line services, nor did the Court address AT&T's interconnection obligations, if any, to the OCCs for the provision of non private line services. Under existing law, argues AT&T, it is required to interconnect its facilities with the OCCs for the provision of only private line services. Because the Commission has determined that Execunet type services are not private line services, AT&T maintains that it is not now legally required to interconnect with the OCCs to enable them to provide other than private line services. Before

the Commission can order AT&T to interconnect, argues AT&T, a hearing pursuant to Section 201(a) of the Communications Act is required so as to enable the Commission to ascertain whether the interconnection of AT&T's local exchange services for the provision of non private line services by the OCCs would be in the public interest. Because a hearing on that issue has not been held, AT&T concludes that it is under no present obligation to offer its local exchange facilities to the OCCs for the provision of Execunet/MTS type services.

4. AT&T advances four legal arguments in support of this position. First, AT&T contends that the Commission specifically determined in its Docket No. 19896 proceeding, *Bell System Tariff Offerings, supra,* that the extent of AT&T's Section 201(a) interconnection obligation with respect to the specialized carriers was limited to private line services, and did not encompass public message services. AT&T directs our attention to a portion of the Commission's decision which focuses on whether FX and CCSA are private line services and asserts that such an analysis would have been pointless if AT&T's interconnection obligation went beyond connections for private line services. *See also Bell Tel. Co. of Pennsylvania, supra,* 503 F.2d at 1273.

5. Second, AT&T avers that in the *Specialized Common Carrier* proceeding, the Commission had before it only applications by OCCs to provide private line services. Consequently, when the Commission ruled in Docket No. 19896 that AT&T already had a Section 201(a) hearing with respect to interconnection of the OCCs in the *Specialized Common Carrier* proceeding, it is obvious, reasons AT&T, that the Commission was considering only whether the public interest would be served by requiring AT&T to interconnect its local exchange facilities for private line services, and not for public message services. Thus, AT&T concludes that the *Specialized Common Carrier* proceeding does not constitute a hearing or contain the public interest findings

necessary to impose a present obligation upon AT&T for it to provide public exchange service connections for use by the OCCs for other than private line services.

6. Third, AT&T states that recent Commission decisions have explicitly restated that the *Specialized Common Carrier* proceeding did not require carrier-to-carrier interconnection for other than private line services, and that before the Commission can order such interconnection on the part of local telephone companies, a Section 201(a) hearing must be conducted. *See Southern Pacific Comunications Company ("SPRINT II")*, 63 FCC 2d 309, 320 (1977), *MCI Telecommunications Corporation ("SPLS II")*, 63 FCC 2d 237, 247 (1977).[3] Furthermore, AT&T states that these decisions also have made it clear that it has no interconnection obligation for non private line services because without an interconnection hearing and decision, such interstate services could currently be terminated by the specialized carriers only through resale of local exchange service obtained under an intrastate tariff. This, in turn, would violate the general requirement that all portions of an interstate service be offered pursuant to an interstate tariff on file with this Commission. Until we conduct a hearing pursuant to Section 201(a) of the Act to determine whether it is in the public interest to terminate specialized interstate services via facilities used in common with public message services, then AT&T contends that such services could not be lawfully terminated because no interstate tariffs are on file which offer such termination service or facilities.

7. Fourth, AT&T contends that the reason the *Execunet* court concluded that the specialized carriers were not restricted to the provision of private line services over their existing authorized facilities was because the Com-

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[3] The *SPRINT II* and *SPLS II* decisions were vacated and remanded for reconsideration after AT&T filed its petition. *MCI Telecommunications Corp.* v. *FCC*, No. 76-2071 (D.C. Cir., February 3, 1978).

mission had made no inquiry into whether competition for public message services was in the public interest, and therefore, the Commission had no basis upon which to restrict the specialized carriers from providing non private line, Execunet-type services. The Court did not address the scope of AT&T's interconnection obligation for such services. But implicit in the Court's holdings, states AT&T, is that the Commission also made no public interest findings which could require AT&T to provide connections and services to be used by the OCCs for the equivalent of public message services. Until a Section 201(a) hearing is conducted into these issues, argues AT&T, the Commission cannot conclude that the public interest requires interconnection for non private line services.

8. AT&T's next major argument is that before the interconnection question is ever reached, the Commission must first determine whether it is in the public interest for OCCs to provide MTS/Execunet-type services, i.e., services that would directly compete with the switched public message telephone network. In *Execunet,* the Court stated:

> we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings. 561 F.2d at 380.

Accordingly, AT&T claims that in the absence of a threshold determination by the Commission that Execunet-type services are in the public interest, it cannot be said that AT&T is under an existing obligation under Section 201(a) of the Act, or otherwise, to provide local exchange connections to the OCCs to enable them to provide non private line services. AT&T contends that the Commission must first be in a position to determine whether and how the public interest would be served by authorizing the OCCs to provide MTS services before it can require AT&T to interconnect with the OCCs for the provision of those services.

9. Next, AT&T asserts that the public interest would be disserved if AT&T were now to provide additional facilities and connections for use by OCCs in furnishing non private line services. To provide these additional facilities and connections to the OCCs prior to a determination that it would be in the public interest to do so, states AT&T, could embark the industry on an irreversible course of intercity MTS competition without the Commission ever having considered the implications of such competition to the public, the carriers, and the industry.

10. Finally, AT&T requests the Commission to act expeditiously on its petition because it anticipates, in the wake of the *Execunet* decision, receiving requests from OCCs for facilities and connections to local exchange services for their use in the provision of MTS/Execunet-type services. Moreover, because AT&T believes no interconnection obligation for such services currently exists, and because AT&T believes the Commission has addressed this precise question in its Docket 19896 proceeding and determined that such connections would not be in the public interest, it states that it will await the Commission's ruling on the instant Petition before it processes any interconnection requests by the OCCs for non private line exchange services.

B. *Contentions of Parties in Opposition*

11. MCI and SPC present the principal arguments against AT&T's petition for declaratory relief. Accordingly, our presentation of the arguments in opposition will concentrate primarily upon the MCI and SPC pleadings. To the extent that other parties have submitted arguments different than those advanced by MCI and SPC, however, they also will be given specific attention.

12. SPC begins by contesting AT&T's argument that the *Specialized Common Carrier* proceeding limited AT&T's obligation to provide facilities and connections to OCCs for only private line services. SPC argues that

Specialized Common Carrier did not restrict the new specialized carrier applicants to private line services, but authorized competition in the broader specialized communications field to include a full range of new and innovative service offerings. SPC points to Datran's authorization to provide a switched all digital end-to-end network, as opposed to other applicants then before the Commission which proposed only point-to-point, rather than switched, services. SPC states that Datran's service would not have met the essential criteria of a private line service set forth in the Commission decision in *Execunet*. Therefore, SPC concludes that AT&T cannot now contend that its interconnection obligation is limited to private line services when AT&T had an obligation to provide interconnection to Datran for its fully switched, non private line service.

13. Next, both MCI and SPC disagree with AT&T that *Specialized Common Carrier*, Docket 19896, and *Bell Tel. Co. of Pennsylvania* require AT&T to provide interconnection to OCCs for only their private line services. It is the position of MCI and SPC that AT&T must provide interconnection facilities to OCCs for all their authorized services, and that AT&T can treat the OCCs no differently than it does its own Long Lines Department. First, SPC and MCI argue that the *Specialized Common Carrier* decision made no mention of limiting AT&T's interconnection obligation to private line services, but included all specialized carrier communications services. Second, these same parties vigorously argue that the Commission decision in Docket 19896 prohibited AT&T from engaging in conduct which would result in denial or unreasonable delay "in establishing physical connections with MCI and other specialized common carriers for their presently or hereafter authorized interstate and foreign communications services." 46 FCC 2d at 439. Consequently, SPC maintains that when these decisions are read together, the test of AT&T's interconnection obligation is not whether an OCC service is a private line service, but whether the service has been authorized. If the service is authorized, then, states SPC,

AT&T is bound to provide interconnection facilities. MCI points out that the question of whether Execunet and similar services are authorized was specifically addressed in the *Execunet* case, where the Court held that MCI was authorized to provide Execunet service over its existing facilities. Therefore, argues MCI, AT&T is legally obligated to furnish interconnection so that its service can be provided. MCI contends that AT&T's present refusal to interconnect its monopoly local distribution facilities to allow MCI to provide a service that the Court determined MCI was authorized to provide would constitute a total abnegation of the Court's mandate.

14. With respect to AT&T's argument that the Commission and Court discussions concerning AT&T's interconnection obligations for FX and CCSA imply that such obligation extends only to private line services, MCI states that the reason these two private line services were the focus of the Docket 19896 proceeding was because AT&T had refused to provide interconnection for them. But in addressing these two services, MCI contends that the Commission did not abandon or limit the broad basis of its holding regarding the interconnection of "all authorized services." MCI supports this argument by quoting a passage from Docket 19896 which states, "that Bell is to provide interconnection facilities for all authorized carriers, including FX and CCSA." 46 FCC 2d at 427.[4]

15. SPC counters AT&T's contention that a hearing pursuant to Section 201(a) of the Act must be held before the Comission can order AT&T to interconnect with the OCCs for the provisions of other than private line services by submitting two reasons why such a hearing is not required. First, SPC argues that the initial clause of Section 201(a) establishes the duty of every common carrier to furnish service upon "reasonable request." It is unnecessary to proceed to the second clause to establish the obli-

[4] SBS strongly supports this argument.

gation of AT&T to provide the requested service or facility, states SPC, if the request is reasonable. Second, SPC believes that if a hearing is required by Section 201(a), such opportunity has already been afforded to AT&T on previous occasions, and AT&T did not present arguments against such interconnection when given the opportunity to do so.

16. SPC argues that the only possible reason that AT&T could consider its interconnection request to be unreasonable is because Execunet-type services would involve the resale or sharing of local exchange facilities and some intrastate tariffs may prohibit this. However, SPC claims that when facilities are used solely for interstate purposes, restrictions in an intrastate tariff are preempted by federal policies where the two conflict. Therefore, if the federal authority authorizes an interstate service, and conflict with a local tariff is preempted, then the request is not unreasonable. ARINC carries this argument a step further by contending that once an interstate service has been authorized by the Commission, then only technical incompatibility would make such a request unreasonable, and absent that factor, Section 201(a) would require AT&T to furnish local exchange facilities so that the authorized interstate service could be provided.

17. If the Commission believes the first clause of Section 201(a) does not apply here, then SPC contends that the "opportunity for hearing" required by the second clause has already been afforded to AT&T, and therefore, the Commission must rule that AT&T's interconnection obligations include providing facilities for Execunet-type services. SPC states that AT&T was given numerous concrete opportunities to establish how such interconnection could disserve the public interest when it was presented with actual tariff filings proposing such interconnection. See *Execunet,* 60 FCC 2d 25 (1976); *Southern Pacific Communications Company* (SPRINT

1), 61 FCC 2d 144 (1976); *MCI* (SPLS I), 61 FCC 2d 131 (1976); *Southern Pacific Communications Company,* (SPRINT II), *supra* and *MCI* (SPLS II), *supra* (1977). SPC argues that AT&T failed to demonstrate in these proceedings that some public interest reason exists why the Commission should not require interconnection for non private line services. Moreover, SPC states that *Bell Tel. Co. of Pennsylvania* makes it clear that a distinct full evidentiary hearing is not required by Section 201(a). Consequently, AT&T has been afforded the "opportunity for hearing" mandated by Section 201(a), and having failed to make its case, the Commission may now lawfully order the interconnection necessary for authorized carriers to provide Execunet-type services without further hearing and as a part of this proceeding.

18. AT&T's argument that a public interest finding is a condition precedent to any ruling by the Commission on AT&T's obligation to provide local interconnection to OCCs for MTS/Execunet-type services, states SPC, is misplaced. In fact, SPC contends that with respect to MCI's Execunet service, and similar authorized service offerings of SPC, AT&T's argument is the reverse of the process contemplated by the *Execunet* Court. In the *Execunet* case, SPC maintains that the Court ruled that MCI has always been authorized to provide its Execunet service, and that until the Commission initiates and completes a proceeding which would restrict these authorizations, Execunet and comparable services of other carriers possess the same legal validity as any other authorized service, and therefore, must be interconnected. The threshold issue described by AT&T may be relevant in a proceeding initiated by the Commission to restrict the scope of future authorizations, argues SPC, but not to restrict the authorizations for existing service categories that the *Execunet* Court determined to be without limitation for existing facilities.

19. If the Commission were to grant AT&T's petition, MCI, SPC, and the Department of Justice contend that such action would raise serious antitrust implications. All three of these parties rely heavily on an established principle of antitrust law known as the "bottleneck" or "essential facilities" doctrine. This principle establishes a general obligation upon those who control access to essential facilities to make such available to actual or potential competitors without unreasonable restriction. All three parties cite *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 377 (1973) in support of this principle. To be an essential facility, it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. See *Hecht* v. *Pro-Football, Inc.,* —— F.2d —— (D.C. Cir., No. 75-1819, December 20, 1977, pp. 17-19) which MCI and SPC both cite. The parties then state that AT&T has a de facto monopoly control of local distribution facilities, that these facilities are essential to the provision of their authorized Execunet-type services, and that it is impractical, if not impossible, for the specialized carriers to duplicate these facilities. Accordingly, AT&T's denial of an obligation to interconnect with the OCCs for provision of its authorized services is a classic example of the "essential facilities" doctrine and, the parties argue, cannot be countenanced by the Commission because it would be a violation of the antitrust laws and contrary to the public interest.

Telenet argues that AT&T's obligation to provide nondiscriminatory access to its monopoly local exchange facilities for authorized services is broader than, and exists independently of the Commission's holdings in Docket 19896, or even Section 201(a) of the Act. Where a carrier has essential control over monopoly facilities, Telenet argues the interconnection obligation arises out of the Sherman Act, and interpretations thereof, proscribing a monopolists "refusal to deal." Both Telenet

and SBS contend that if AT&T is relieved of its obligation to provide connections for MCI's Execunet Service, then the authorization found by the Court to have been made for that service would be virtually nullified. MCI states further that a denial of AT&T's petition would be in keeping with our policy of full and fair competition established in *Specialized Common Carrier*. The Department of Justice also argues that the *Execunet* decision held that AT&T possesses no de jure monopoly, and therefore, AT&T cannot be granted its request for expedited relief so as to deny competing carriers access to essential local loop facilities in order to preserve its monopoly position of intercity service.

20. With regard to another antitrust matter, the Department of Justice states that those who advocate restrictions on competition have the burden of proving, with facts, that such restrictions are in the public interest. The Department believes that AT&T's petition fails to meet this threshold burden, and therefore must be denied. AT&T's mere assertion that its revenues and pricing policies would be adversely affected if interconnection for Execunet-type services was provided to the OCCs, contends the Department, is obviously insufficient to act as a basis for the protection AT&T seeks. Under *Carroll Broadcasting Co.* v. *FCC*, 208 F. 2d 440 (D.C. Cir. 1958), a case relied on by the *Execunet* Court, the Department urges that we cannot equate injury to regulated firms with injury to the public interest. The *Carroll* case, contends the Department, stands for the proposition that competitors may severely injure each other to the great benefit of the public. Absent a factual showing of harm to the public by AT&T, the Department states that the Commission cannot assume that preserving AT&T's de facto monopoly over MTS/Execunet-type services is desirable in the public interest. Finally, the Department concludes that for the past twenty years AT&T has predicted cataclysmic effects from the pro-

competitive rulings of the Commission and courts, and, as yet, no evidence has surfaced to indicate that competition has caused a deterioration in service or an increase in rates to any class of customers. Therefore, the Department urges that we deny AT&T's petition and refrain from instituting a hearing into whether AT&T should be required to interconnect for non private line services, unless AT&T can make some initial showing as to why such a restriction would serve the public as distinguished from its own corporate interests.

21. Telenet and ASC believe that AT&T's attempt to limit its present interconnection obligation to OCCs for the provision of services which are private line services is too ambiguous and creates the potential for abuse. ASC strenuously objects to allowing AT&T to become the final arbiter of what constitutes a permissible private line service for purposes of interconnection. ASC believes that this would put the OCCs in the untenable position of proving to AT&T that every new service offering was not an Execunet-type or other non private line service. ASC argues that the authority to evaluate the public interest justifications for any new service should not be delegated to AT&T. Therefore, ASC requests that the Commission limit its review to whether Execunet service must be presently interconnected, and not to the more general issue of interconnection of OCC services.

22. Telenet states that the OCC concept is one of AT&T's design, and therefore, AT&T could change its view of what constitutes an OCC at any time. While this could lead to abuse, Telenet contends that regardless of how AT&T chooses to classify a common carrier, AT&T nevertheless has an obligation to provide access to monopoly facilities which are essential to the provision of any service authorized and certificated by the Commission.

C. Comments of Other Parties

23. The international record carriers (IRCs), ITT Worldcom, RCA Globcom and WUI have all expressed concern that the language used in AT&T's petition to describe the extent of its interconnection obligations is overly broad, and if sustained by the Commission could be construed to allow AT&T to refuse interconnection with the IRCs for their non private line services. The specific language at issue is AT&T's statement that:

> this pleading concerns only whether Petitioners have a duty to provide to MCI and other OCCs additional facilities and connections to Petitioner's exchange services *for use by OCCs in their provision of Execunet-type services or any other offering which is not a private line service.* (Emphasis added)

Because AT&T categorizes the IRCs as OCCs, and because the international telex and dataphone-type services offered by the IRCs are not private line services, these parties contend that a literal application of the language in the AT&T petition could permit AT&T to refuse the IRCs interconnection facilities for these services. The IRCs state that interconnection for these international services raises entirely different issues than those involved in the AT&T dispute with the domestic specialized carriers. Accordingly, the IRCs request that we distinguish the AT&T/IRC interconnection matters and expressly limit the AT&T petition to those matters involving the interconnection of domestic specialized carriers to the public switched telephone network.

24. CBEMA, ADAPSO and Graphnet have also noted their concern that the above-cited sweeping language used by AT&T in its petition, if granted by the Commission, could be used by AT&T to deny interconnection to local exchange services which are essential to

the provision of services authorized for value-added carriers and for OCCs offering specialized data and alternate voice/data services. Moreover, these parties contend that AT&T's "unspoken definition of private line services" could create substantial confusion if AT&T's declaration is granted. ADAPSO contends that the decisions relied on by AT&T to define its interconnection obligations to OCCs apply only to voice use private line services. Accordingly, CBEMA, ADAPSO,[5] and Graphnet request that whatever action is taken, the Commission should not alter AT&T's present interconnection obligations to these carriers, and in addition, should expressly incorporate the Commission's prior definitions and discussions of what constitutes a private line service.

D. *Comments in Support*

25. GTE agrees with AT&T that its present legal obligation to interconnect with the specialized carriers is limited to private line services. In support of this argument, GTE stresses the representations made by counsel for MCI in the *Specialized Common Carrier* proceeding. At that time, GTE observes that it was MCI's intention to provide only private line services which were the equivalent of private microwave. When the Commission subsequently ordered AT&T to interconnect with the specialized carriers for their authorized services pursuant to *Specialized Common Carrier,* GTE argues that the interconnection order obviously extended to only private line services because those services were the only

[5] ADAPSO has also filed a "Motion to Respond to American Telephone and Telegraph Company." ADAPSO made this request based on its concern that the scope of AT&T's requested relief might not be adequately clarified by AT&T in its Reply. In order to expedite our ruling in this matter, we hereby deny ADAPSO's request. However, we believe ADAPSO's concerns have been directly addressed in n.2, *supra.*

kind the specialized carriers were authorized to provide. Since that decision in *Execunet* did not upset the Commission's determination that Execunet service is not private line service, GTE contends that before AT&T can be required to interconnect, a hearing pursuant to Section 201(a) must be held to ascertain whether interconnection to local exchange services should be provided to the specialized carriers for the provision of Execunet/MTS type services.

26. USITA reminds the Commission that the independent telephone companies are also subject to the policies announced in *Specialized Common Carrier,* and that these companies agree with AT&T that a hearing is required before the Commission can order the independent carriers to offer interconnection to the OCCs for the provision of non private line services. Moreover, the Commission must make a fundamental public interest determination "whether competition like that posed by Execunet is in the public interest," *Execunet,* 561 F. 2d at 380, states USITA, before it can require the telephone companies to interconnect for these services.

27. Continental asserts that a Section 201(a) determination has never been made with respect to the interconnection of non private line services. Continental argues that the *Execunet* decision actually supports AT&T's position because it left to the Commission the question of whether the provision of Execunet-type services by specialized carriers is in the public interest. By recognizing that the Commission has never made such a public interest finding, Continental contends that the Court implicitly acknowledged that there could not have been a previous Section 201(a) finding that the public interest mandates interconnection of these services with local exchange facilities. Accordingly, Continental believes that the *Execunet* decision confirms AT&T's obligation

to interconnect with the specialized carriers for only private line services.

28. In a separate petition, Continental states that in the wake of the *Execunet* decision, MCI, SPC, and ITT's United States Transmission Systems, as well as other specialized carriers, will be seeking to offer Execunet/MTS type services because no affirmative public interest determination pursuant to Section 214(c) of the Act, 47 U.S.C. § 214(c), has yet been made to restrict the facilities authorizations of the specialized carriers to private line services, as required by *Execunet*. Therefore, Continental argues that these carriers are now free to offer services that are essentially the same as, and compete directly with, message toll service. Continental claims that if the growth of Execunet-type service by means of the existing facilities authorizations is not temporarily halted pending a hearing as to whether it is in the public interest for specialized carriers to provide such services, the competitive responses of the established carriers will lead to an abandonment of nationwide rate averaging and a reduction or elimination of contributions from message toll services to local exchange carrier revenue requirements. The toll settlement contribution from message toll service amounts to over 60 percent of Continental's revenue requirement, and if some of these contributions were diverted by reason of competition for MTS services, then Continental maintains that this could irreparably disrupt its current pricing policies, with a significant impact upon its telephone subscribers. Furthermore, Continental argues that if the growth of Execunet-type services is left unchecked, additional interconnects would disrupt the marketplace, confuse the public concerning continued availability of these services and promote expansion of specialized carrier facilities that could prove wastefully duplicative. Should the Commission subsequently decide that these services are not

in the public interest, a decision to eliminate or condition the services would then become exceedingly difficult to implement, states Continental. Accordingly, Continental requests the Commission to utilize the broad statutory authority conferred upon it by Section 4(i) of the Act, 47 U.S.C. § 154(i), to prevent further growth of Execunet-type services pending resolution of the vital question of whether competition in the MTS marketplace is in the public interest. Continental states that in *U.S.* v. *Southwestern Cable,* 392 U.S. 157 (1968), the Supreme Court specifically affirmed the Commission's authority under Section 4(i) to issue interim orders preserving the status quo until the Commission can make a determination as to whether the expansion of a regulated service is in the public interest.

29. For the same reasons described above, USITA joins Continental in its request to preserve the specialized carrier situation as it exists at the moment.

E. *AT&T's Reply*

30. AT&T begins its reply by framing what it believes is the critical issue now before the Commission—"whether the Commission has ever ordered the Bell System to interconnect its facilities with those of MCI and other specialized carriers for their use in providing the functional equivalents of message telephone service." AT&T states that its petition does not request the Commission to adopt new interconnection policies or to retreat from existing ones, but requests only that the Commission affirm its past interconnection policies by ruling that AT&T has no present obligation to provide additional connections to local exchange facilities to OCCs for their use in providing Execunet-type services. In this respect, AT&T responds to the contentions of the IRCs and value-added carriers that the petition could be construed to alter their present interconnection arrange-

ments. AT&T assures these carriers that the services they now provide "are not functionally equivalent to MTS; thus, if granted, the Petition would not affect the provision of connections to IRCs or value-added carriers for such services."

31. Next, AT&T disagrees with the comments of the Department of Justice that it has not satisfied all preconditions to the grant of declaratory relief. In stating that AT&T has failed to make a "factual showing of harm" in support of its petition, the Department of Justice, states AT&T, clearly misunderstands the issue. AT&T argues that it is seeking only a determination of its legal obligations under existing Commission orders, and is not seeking relief from outstanding obligations. Only in the latter case, argues AT&T, might a factual showing of harm be relevant. AT&T also disagrees that its petition seeks creation of a de jure monopoly for intercity services, as the Department of Justice believes. Rather, states AT&T, the only determination sought is whether it has an obligation under prior Section 201(a) orders to interconnect with the OCCs for their provision of non-private line services.

32. AT&T next asserts that the orders in Docket 19896 clearly establish the Bell System's interconnection obligation with respect to private line services, but do not, as the Oppositions argue, require interconnection for all authorized OCC services. In Docket 19896, no OCC sought to establish or justify interconnections for Execunet-type services, states AT&T, and therefore that proceeding cannot be deemed to have provided the notice, opportunity for hearing, and public interest findings required by Section 201(a) to establish such an interconnection obligation. Furthermore, since a policy of competition for public switched message services has never been adopted by the Commission, AT&T contends that it

cannot now be said that the existing Commission interconnection orders require it to provide connections to OCCs so that they can offer such services. Finally, AT&T states that repeated statements throughout the Docket 19896 proceeding clearly indicate that its scope was limited to private line services. In fact, argues AT&T, when the Third Circuit affirmed Docket 19896 in *Bell Tel. Company of Pennsylvania, supra,* it rejected AT&T's argument that the Commission's interconnection orders were unduly vague and overbroad on the express representations made by MCI, SPC, and the Commission that the interconnection obligation extended to only private line services. See 503 F. 2d at 1273-74.

33. With respect to the argument made by SPC and ARINC that the first clause of Section 201(a) itself establishes an interconnection obligation, AT&T maintains that such an interpretation of the statute is contrary to its plain language. That clause, states AT&T, does not deal with carrier interconnection, but with the provision of communications services to customers. The second clause deals with physical connections to other carriers and requires a hearing to determine if such a connection is in the public interest.

34. Turning to the *Execunet* decision, AT&T asserts that the Court's mandate directs only what the Court has said in its opinion and judgment. Because neither the opinion nor the judgment discusses or decides whether the Bell System has a legal obligation under Section 201 (a) to provide connections to MCI for Execunet-type services, then AT&T disputes MCI's contention that the mandate compels the provision of additional connections for Execunet service. AT&T argues that in resolving the authorization question, the Court did not have to decide the interconnection question, nor did it do so. Moreover, AT&T disagrees with MCI's assessment that the entire

Execunet proceeding will be rendered futile if interconnection is denied. Because the *Execunet* decision found that MCI was authorized to provide Execunet service, then AT&T argues that this places MCI in a position to request the Commission to expand the Bell System's interconnection obligations under Section 201(a) of the Act. Because the Court did not decide the issue, states AT&T, does not render the decision a futility. AT&T also maintains that since the Commission in *Execunet* did not decide the scope of AT&T's interconnection obligation in relation to public switched message services, such as Execunet, that the Court would have violated the separation of function between an administrative agency and a court by deciding an issue, such as interconnection, which was never presented to the court.

35. In reference to the antitrust "essential facilities" doctrine which SPC, MCI and the Department of Justice use in support of their theory that AT&T's monopoly control over local distribution facilities creates an obligation upon AT&T to make these facilities available to competitors, AT&T answers that these antitrust arguments rest on false assumptions. First, AT&T argues that this is not a de novo proceeding under Section 201(a) where such an argument might be made to establish a new interconnection obligation. The absence of such a hearing, argues AT&T, is exactly why the relief it seeks is warranted. Second, AT&T contends that even in a new Section 201(a) proceeding to establish interconnection obligations, under the Communications Act it is the public interest standard which governs and not antitrust law. AT&T cites *FCC* v. *RCA Communications,* 346 U.S. 86, 93 (1953); *Hawaiian Telephone Co.* v. *FCC,* 498 F.2d 771 (D.C. Cir. 1974) and *Satellite Business Systems,* 62 FCC 2d 997 (1977), among other cases, to support its argument that competitive considerations are only one part of the public interest standard, and that the Commission cannot presume, as does antitrust law, that compe-

tition is in the public interest. AT&T argues that the *Otter Tail* case relied upon by the Oppositions clearly distinguished antitrust principles from the public interest regulatory standard involved therein, and concluded that while antitrust consideration might be relevant, they are not determinative. Finally, AT&T states that even in an unregulated industry, the antitrust cases do not support such a broad reading of the "essential facilities" doctrine as advanced by the Oppositions.

36. AT&T next states that it has never acknowledged any obligation to provide interconnection for Execunet and is not estopped from raising the issue. The reason the Bell System originally provided interconnection facilities for Execunet, states AT&T, was because it was not aware of the true nature of the service. The *Execunet* proceeding dealt with the lawfulness of this service offering, and not to interconnection. Hence, AT&T contends that because this issue was never raised, estoppel principles do not apply.

37. Finally, AT&T maintains that the relief requested will preserve the Commission's ability to determine the public interest. If the Bell System were required to provide additional connections for Execunet-type services, without a Section 201(a) hearing, then AT&T argues that the OCCs have enough intercity facilities already in place to alter substantially the present structure of the nation's telecommunications industry. By granting AT&T's petition, AT&T believes the Commission can avoid such deleterious consequences and thereby retain its ability to determine what should be the appropriate structure of the industry, and whether competition in public switched message services would serve the public interest.

F. *Other Reply Comments*

38. MCI contends that the language of the *Bell System Tariff Offering* order stating that AT&T is obligated to in-

terconnect for all presently or hereafter authorized services settles the question presented by AT&T's petition. MCI also says that telephone company assertions that the telephone companies will suffer financial injury if MCI continues to provide Execunet service are unfounded.

39. USITA contends that the basis for this current dispute involves differing interpretations of the *Execunet* decision. The *Execunet* case simply held, argues USITA, that the Commission committed reversible error in rejecting the Execunet tariff on the grounds that MCI's facility authorizations were restricted to private line services. However, USITA contends MCI and SPC interpret the decision as authorizing Execunet-type services by the specialized carriers and that AT&T must therefore furnish local exchange facilities for all authorized services under the holding in *Bell Tel. Company of Pennsylvania* v. *FCC*. USITA asserts that *Execunet* did not authorize anything, and specifically left to the Commission the question of "whether competition like that posed by Execunet is in the public interest." 561 F 2d at 380. USITA argues that if the Commission cannot now correct the judicially found error by conditioning the specialized carrier's authorizations, as MCI would have it, then the Commission will have lost control of its licensing processes.

40. GTE observes that neither MCI nor SPC has shown that Execunet-type services fit within the scope of private line services, and therefore, argues GTE, they fail to support their conclusion that terminating facilities must be provided. In this regard, USITA states that telephone company's local exchange facilities are not the only way by which MCI or SPC may reach their customers. Other available options recognized by the Commission in *Specialized Common Carrier*, states USITA, are customer provided facilities or specialized carrier facilities. In arguing the "essential facilities" doctrine, USITA contends that the Department of Justice overlooked these alternatives.

41. SPC's reliance on Datran's authorization for a switched data service as proof that the specialized carriers were given authority to provide other than private line service, argues GTE, is incorrect. Datran proposed to offer data transmission links, and in 1970 and 1971, GTE asserts these were "generally understood to be private line." Finally, GTE states that the Department of Justice position urging immediate expansion of Execunet-type services ignores the requirements of Sections 1 and 214 of the Communications Act, 47 USC §§ 151,214. Because Execunet-type service has been found by the Commission to be equivalent to MTS, GTE asserts that *Execunet* did not prohibit the Commission from limiting the expansion of this service until further analysis and hearings can be held.

Discussion

II. Background

42. In 1970 we instituted a rulemaking proceeding to examine common policy questions presented by a large number of applications from entities other than AT&T and Western Union for authority to construct facilities to provide specialized interstate common carcrier communications services. *Specialized Common Carrier Services,* 24 FCC 2d 318. Some of those applicants such as Data Transmission Corporation (Datran) proposed to provide specialized services which were substantially different from any service then being offered by the established carriers. Other applicants proposed to provide specialized services which appeared to be competitive with existing specialized services of established carriers which the established carriers had traditionally described as "private line" services. After extensive proceedings, we concluded that "a general policy in favor of entry of new carriers in the specialized communications field will serve the public interest . . ." *Id.* at 920.

43. Existing carriers filed comments in that proceeding opposing new entry. AT&T alleged that the entry of new carriers in the interstate communications market would adversely affect the public interest, claiming in particular that "cream-skimming" by new entrants providing service on major intercity routes would undermine the nationally-averaged uniform rate structure which then prevailed for all intercity services and would deprive the public of the benefits of economies of scale by delaying the installation of large capacity facilities. *Id.* at 910. USITA expressed concern that new entry would result in reduced revenue settlements to local independent telephone companies from existing intercity carriers which would have an adverse impact upon the independent telephone companies' ability to provide local exchange service. *Id.* at 914, n. 37. The nature of USITA's concern is more fully described in our First Report in Docket No. 20003 (Economic Inquiry), 61 FCC 2d 766 (1976). Under existing separation and settlement procedures, a portion of the revenues from interstate message telephone toll service (MTS) and wide area telephone toll service (WATS) are returned to the local telephone operating companies in payment for the use of local exchange facilities in rendering interstate services. A reduction in the amount of interstate revenues returned to the local telephone companies through this process, which could result from either diversion of interstate traffic and revenues to a specialized carrier not subject to the separations and settlement proceedings or from a repricing of MTS and WATS to meet specialized carrier competition, would allegedly force local telephone companies to raise rates for local exchange service to cover their relatively fixed operating costs.

44. Our *Specialized Common Carrier* decision concluded that entry of the new carriers could not produce the kind of impact claimed by AT&T "in view of the very small

percentage of AT&T's existing market that is vulnerable to competition of the kind proposed here" (*id.* at 910) and that the independent telephone companies would not be adversely affected (*id.* at 914). We noted that "the portion of AT&T's total business which might be jeopardized, i.e., the interstate private line business, represented only a very small fraction of Bell's total revenues" (*id.* at 911) and declared that "it is difficult to visualize how independent telephone companies would be adversely affected." (*id.* at 914).

45. The *Specialized Common Carrier* decision also addressed the problem of providing local distribution for interstate services of the new carriers and declared "that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier." *Id.* at 940.

46. In the summer of 1973, MCI advised the Commission that AT&T was refusing to interconnect with MCI for the provision of services which the AT&T Long Lines Department provides to its private line customers. After letters from the Chairman of the Commission and the Chief of the Common Carrier Bureau failed to resolve the dispute, the Commission instituted a proceeding to clarify AT&T's interconnection obligations with the specialized common carriers. 44 FCC 2d 245 (1973). We rejected AT&T's contention that specialized common carrier services do not encompass private line services such as FX or CCSA which require interconnection with the public switched telephone system. *Bell System Tariff Offerings, supra.* We concluded that the *Specialized Common Carrier* decision contemplated that the new carriers would be authorized to offer services which compete with interstate private line services offered by AT&T, including private

line services which must interconnect with or utilize a part of the switched public telephone network.

47. Paragraph 53(a) of the *Bell System Tariff Offerings* Order (46 FCC 2d at 438) directed AT&T to:

> (a) Furnish to MCI Telecommunications Corporation, MCI New York West, Inc. and other specialized common carriers the interconnection facilities essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communications services, including interconnection by the specialized carriers into a telephone company's local exchange facilities for the purpose of furnishing Foreign Exchange (FX) service or for insertion into telephone company Common Control Switching Arrangements (CCSA);"

48. AT&T filed a petition for review in the United States Court of Appeals for the Third Circuit. AT&T challenged the decision on various grounds including the alleged "overbreadth" of the interconnection order. The brief filed in that Court on behalf of the Federal Communications Commission and the United States observed (Brief, p. 49, n. 14):

> AT&T also argues that the Commission's cease and desist order is overly broad in stating that interconnection is required for services "hereafter" authorized. Read in context, however, it is clear that the Commission was saying that MCI and the other specialized carriers were to be afforded the same service as Long Lines and the independent telephone companies. See *FTC* v. *Cement Institute,* 333 U.S. 683 (1948). "Hereafter" simply embraces those private line services which Long Lines and the independents provide or may provide, and which the specialized carriers do not

now provide but may become authorized to provide in future proceedings. The Commission included this language in recognition of the developing nature of the industry and in the interest of averting further litigation in an area of well defined policy. See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *NLRB* v. *Local 282, International Brotherhood of Teamsters*, 428 F.2d 994 (2d Cir. 1970). The breadth of the order is modified still further: Every time the word "hereafter" appears, it is followed by the word "authorized." Thus, only after authorization is obtained from the Commission is interconnection required, and the telephone companies have every right to oppose authorizations in the "hereafter." Finally, if any serious questions arise, AT&T can seek guidance from the Commission. *Lafayette Radio Electronics Corp.* v. *U.S. and FCC*, 345 F.2d 278, 281-82 (2d Cir. 1964).

49. Some of the intervenors' briefs which were filed in that proceeding contained similar observations with respect to the breadth of the interconnection order. The brief for SPC said that the order does not impose an "unbounded" interconnection obligation and that "the Commission obviously was seeking to require the telephone companies to provide the specialized carriers with all private line services (itself a substantial limitation) of the same or similar character." (Brief, p. 61). The brief for MCI said (Brief, pp. 52-53): "[W]hile it is correct that the Commission's language requires Bell to permit physical connections 'essential' for 'all' of the private line services which any of the specialized carriers are now or may 'hereafter' be authorized to offer, the obligation is qualified and limited by the duty set forth in the Decision that such interconnection facilities must be 'similar to, these presently provided to Bell's Long Lines Department on a non-discriminatory basis.'"

50. In its opinion affirming the *Bell System Tariff Offerings* order the Court of Appeals said: "Were we to read the Commission's order in a vacuum, we would be inclined to agree with petitioner that the order is somewhat vague and, to a certain extent, overbroad." 503 F.2d at 1273. The Court added that orders are not to be read in a vacuum, observed that the Commission opinion "[v]iewed in its entirety . . . operates to preclude AT&T from treating its Long Lines Department and its affiliates differently than it treats the specialized common carriers" (*Ibid.*) and concluded (*Id.* at 1273-1274): "As we read the order, the FCC has required AT&T to provide to the specialized carriers those (interconnection) elements of *private line services* which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department." (emphasis added).

51. Shortly before the Court of Appeals issued its decision affirming the *Bell System Tariff Offering* order AT&T filed revised tariffs covering facilities and services which AT&T furnishes to other carriers including specialized common carriers. We instituted an investigation of those tariffs. AT&T then proposed that we convene and chair negotiations among AT&T and other carriers for the purpose of resolving a variety of technical, operational, and other issues concerning the specific arrangements which would be provided for interconnecting AT&T and other common carrier facilities and services. Several months of negotiation led to a Settlement Agreement which we accepted as a basis for terminating the tariff investigation. *AT&T*, 52 FCC 2d 727 (1975). AT&T filed tariffs implementing that agreement which remain in effect to this date.

52. Meanwhile, MCI had filed revised tariffs on September 10, 1974, which identified a number of "modular" service elements which could be combined to create a variety of service offerings. Although members of our staff expressed concern regarding certain ambiguities in the re-

vised tariff, that tariff was permitted to enter into effect by operation of law on October 10, 1974.

53. In the spring of 1975 AT&T advised us that it believed a metered use service called "Execunet" which MCI was offering pursuant to its modular tariffs was not a private line service and was equivalent to MTS. After reviewing comments filed by both AT&T and MCI, with respect to the nature of Execunet service, we issued an order on July 2, 1975, rejecting the revised MCI tariff as unlawful insofar as it purported to offer Execunet service. That order said that the *Specialized Common Carrier* decision contemplated entry of specialized common carriers in competition with AT&T "only in the private line field, not in the area of switched public message telecommunications service" (60 FCC 2d at 62) and concluded that "Execunet service is essentially a switched public message telephone service, rather than private line." *Id.* at 63. After further proceedings to reconsider that order based on new information developed by MCI, we issued an order affirming our decision to reject MCI's tariff. *MCI Telecommunications Corp.*, 60 FCC 2d 25 (1976) ("*Execunet*").

54. On review the United States Court of Appeals for the District of Columbia Circuit reversed the *Execunet* rejection order. *MCI Telecommunications Corp.* v. *FCC*, *supra*. That Court concluded that a facility authorization issued pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, authorizes a carrier to offer any service which the facility is capable of providing in the absence of a condition adopted pursuant to Section 214(c) which expressly restricts the services which may be offered. The Court noted that the Section 214 authorizations which were issued to MCI prior to our *Execunet* decision do not contain any effective conditions restricting the services which may be provided. The Court also held that neither the *Specialized Common Carrier* decision nor the subsequent facility authorization proceedings contained an adequate finding that MCI's provision of particular services would

be contrary to the public interest and concluded that such a finding is essential to support a restriction on MCI's use of its facilities. The Court of Appeals held that we erred in rejecting the tariff on the grounds that MCI did not have the requisite authority to use its existing facilities to provide Execunet service. The Court's opinion did not address MCI's contention that we also erred in rejecting MCI's claim that Execunet is a private line service.

III. Prior Section 201 Orders

55. AT&T's request for a declaratory ruling that it has "no obligation" to provide interconnection to specialized common carriers to enable them to provide services which are not private line services raises two distinct questions. Have we directed AT&T to provide such services in any prior interconnection order issued pursuant to Section 201(a) of the Communications Act, 47 U.S.C. § 201(a)? Does AT&T have any legal obligation to provide such interconnection apart from any Section 201(a) interconnection Order? We will address the first question in this section of the opinion.

Section 201(a) provides in relevant part:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio . . . in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, . . .

56. The *Bell System Tariff Offerings* order is a Section 201(a) interconnection order and Paragraph 53(a) of that order states that AT&T is directed to provide specialized common carriers with interconnection facilities essential to the rendition of *all* of their presently or hereafter authorized interstate and foreign communications. MCI

and SPC would read that paragraph in isolation to mean that the order requires AT&T to provide interconnection services to enable MCI to provide Execunet service through facilities which have been constructed pursuant to unconditional or improperly conditioned facility authorizations. However, the Court of Appeals for the Third Circuit concluded that Paragraph 53(a) must be read in context of the entire Commission opinion as requiring interconnection for private line services which are similar to private line services offered by AT&T through interconnection between AT&T Long Lines and Bell System affiliates. That is indeed the interpretation which both we and all parties have given this Order in prior proceedings, and thus the one which we shall continue to accord it in this proceeding. We are bound by the Third Circuit's interpretation of that order. In concluding that the order was limited to private line services that Court had before it representations in the briefs filed by this Commission in conjunction with the United States, as well as those filed by MCI and SPC, with respect to the scope of the order. Therefore, we could not utilize the *Bell System Tariff Offerings* order as a basis for enforcement proceedings to compel AT&T to provide interconnection facilities to any specialized common carrier for any service which is not within the scope of specialized and private line services addressed in the *Specialized Common Carrier* proceeding.

57. None of the comments which have been filed in response to this AT&T petition except AT&T's reply comments discuss the representations contained in brief filed in *Bell Tel. Co. of Pennsylvania* and most of the comments do not discuss the Court of Appeals opinion in that case. MCI and SPC do claim that that Court of Appeals did not attach any significance to the distinction between private line services and other services. MCI says that AT&T's overbreadth claim focused upon services which might be authorized in the future and accordingly contends that the Court of Appeals opinion should not be read as limiting

AT&T's obligation to provide interconnection for *all* previously authorized services, SPC advances a different interpretation of the opinion. It contends that the Court of Appeals merely sought to limit the broad language of the interconnection order to require Bell operating companies to supply interconnection facilities to specialized carriers which are similar to interconnection facilities furnished to the AT&T Long Lines Department.

58. We cannot accept either of those interpretations of the Court of Appeals opinion. Various parties did represent that the interconnection obligations under the *Bell System Tariff Offerings* order are limited to private line services and that Court did say that it understood the order to be limited to private line services. That statement appeared in the context of a discussion of the reasons which caused that Court to refrain from remanding the matter to the Commission with instructions to draft a narrower interconnection order. We cannot assume that such a remand order would not have been issued in the absence of representations that the interconnection obligations imposed by that particular order are limited to private line services. Accordingly, the words "all of their presently or hereafter authorized interstate and foreign communication services" in Paragraph 53(a) of the *Bell System Tariff Offerings* order can only be read to mean "all of their presently or hereafter authorized interstate and foreign *private line* communications services." (emphasis added), as the Third Circuit held. *Bell Tel. Co. of Pennsylvania, supra,* 503 F.2d at 1273-1274.

59. This is an appropriate point at which to address SPC's contention herein that the *Specialized Common Carrier* proceeding did not restrict the new specialized carrier applicants to private line services, in support of which SPC points to Datran's authorization therein to provide a switched all digital data communications network (*see* paragraph 12 above). It is true that the Specialized Carrier

decision encompassed specialized communications services other than those which theretofore had been described by the established carriers as "private line" services. It is also true that in the ensuing debate and litigation regarding required interconnection arrangements, the term specialized communications service was frequently omitted in favor of the more limited term "private line." The use of this abbreviated expression apparently arose as a result of the context in which these issues were raised, i.e., whether the specialized carriers should be accorded the same interconnection rights as were accorded AT&T's internal operations in Bell's offering of "private line" services. We believe it is clear that the *Specialized Common Carrier* decision as well as our order in *Bell System Tariff Offerings* and the Court's decision in *Bell Tel. Co. of Pennsylvania* require interconnection for all *specialized* interstate communication services, including switched digital services such as those developed by Datran. What is germane to the present proceeding, however, is a determination as to what services were explicitly *excluded* from consideration in *Specialized Common Carrier, Bell System Tariff Offerings,* and *Bell Tel. Co. of Pennsylvania.* We believe it is clear that MTS and WATS services, and therefore services by other names which are the functional equivalent of MTS and WATS, were excluded from both the considerations and holdings of these proceedings. The interconnection discussion in those opinions can only be read to mean that all telephone companies are required to provide facilities and interconnections which the specialized common carriers may need to provide both conventional private line services and new specialized services which may differ from any private line service which was being offered by the established carriers in June 1971.[6]

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[6] Although the *Bell System Tariff Offerings* order was directed at AT&T, the interconnection provisions of the *Specialized Common Carrier* decision are applicable to all of the telephone companies.

60. However, the *Specialized Common Carrier* decision cannot be interpreted as ordering interconnection for the purpose of enabling specialized common carriers to provide services which are substantially equivalent to MTS and WATS from the user's perspective. In the *Specialized Common Carrier* decision we declined to consider arguments that the diversion of MTS or WATS revenues from the existing carriers would produce effects which may be adverse to the public interest because the applicants had indicated that they did not proposed to provide any service which would be capable of diverting any significant amount of MTS or WATS business. 29 FCC 2d at 910-915. If the *Specialized Common Carrier* decision ordered all telephone companies to interconnect with the specialized common carriers for the purpose of enabling the specialized common carriers to provide services which are the functional equivalent of, and thus directly competition with, MTS or WATS, then all of the telephone companies were deprived of a meaningful opportunity for a hearing with the respect to the public interest consequences not only of such competition but also of such interconnection. Such an action would violate their rights under Section 201(a). We decline to adopt a construction of that decision which is based on the premise that we did deprive the telephone companies of their statutory rights.

61. Our conclusion with respect to the scope of the interconnection order in the *Specialized Common Carrier* decision is entirely consistent with the Court of Appeals opinion in the *Execunet* case. That Court concluded that a Section 214(c) condition requires an affirmative finding that the provision of particular services would be detrimental to the public interest. The Court observed that the *Specialized Common Carrier* proceeding did not constitute a proper hearing on the issue of MTS or WATS competition, and thus could not serve as a proper basis for Section 214(c) restrictions. A Section 201(a) interconnection order likewise requires an affirmative finding, after hearing, that interconnection will be beneficial to the public interest. The hearing issues required to determine the public interest in

each of these situations are essentially identical. To determine whether the public interest requires that specialized carrier facility authorizations be limited to preclude their use for MTS-type services, we must determine whether or not the public interest will be served by the competitive offering of such services. Similarly, to determine whether the public interest requires that local telephone companies be ordered to provide the interconnections required to complete such service offerings, we must also determine whether or not the public interest will be served by the competitive offering of MTS-type services. Neither of these issues has been resolved in prior Commission hearings or proceedings; both will be addressed in the hearing we intend to initiate forthwith in compliance with the remand order in the *Execunet* case.

62. We have noted the Department of Justice's contention that AT&T has the burden of proof because any action which deprives the specialized common carriers of interconnection they need to provide any service will have an anticompetitive effect. Inasmuch as we declined to consider AT&T's "proof" in the *Specialized Common Carrier Services* proceedings, we need not determine whether AT&T would have had the burden if we had attempted to determine whether the entry of specialized common carriers into the MTS-WATS market would be in the public interest. AT&T was clearly entitled to an opportunity for hearing with respect to such questions and it did not receive such an opportunity at that time.[7]

63. The Department of Justice may be suggesting that we should decline to construe our prior interconnection orders because clarification of those orders may lead AT&T

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[7] We also declined to address the concerns expressed by USITA in the *Specialized Common Carrier* proceeding because we assumed that the specialized common carriers would not be providing services which could have an impact upon the revenues of the independent telephone companies. Thus, USITA did not receive an opportunity to have its "proof" considered.

to take actions which are undesirable or unlawful. We could not decline to provide guidance with respect to the scope of prior orders even if clarification produces such a result. We have an obligation to respond to reasonable requests for guidance with respect to the scope of parties' obligations under our orders, particularly where, as here, AT&T is subject to a cease and desist order. As previously noted, the brief filed on behalf of the Federal Comunications Commission and United States in the Court of Appeals for the Third Circuit said: "[I]f any serious questions arise, AT&T can seek guidance from the Commission." (Brief, p. 49, n. 14).[8]

IV. Other Interconnection Obligations

64. The Communications Act does not preclude carriers from entering into voluntary interconnection arrangements in the absence of a Section 201(a) order. We have not adopted any rule or issued any order which would prohibit AT&T from entering into interconnection arrangements with any specialized common carrier to enable that specialized common carrier to provide any service. Accordingly, while we have concluded that prior Section 201(a) order relating to specialized common carriers do not direct

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[8] We have also noted SPC's contention that AT&T had an "opportunity" for hearing with respect to the desirability of new entry in the MTS-WATS market in subsequent proceedings and failed to avail itself of that opportunity. We must disagree. Consistent with our treatment of this issue in the *Specialized Common Carrier* proceeding, we have explicitly excluded it from consideration in all subsequent proceedings concerning competition in the domestic common carrier industry. While we have examined certain broad economic issues, including the potential effects of competition in the specialized services market on the economics of MTS, WATS, and local exchange services, none of these investigations has explored the social and economic effects of competition in the provision of MTS and WATS. To hold that such broad economic inquiries have provided the telephone industry the "opportunity" for a hearing when the hearing issue was so explicitly excluded would be a clear abuse of due process.

AT&T to provide interconnection for services which are substantially equivalent to MTS or WATS, it remains to be determined whether AT&T has any other legal obligation to provide such services.

A. *The Court of Appeals Mandate*

65. MCI apparently contends that the Court of Appeals mandate in the *Execunet* case either imposes an obligation upon AT&T to provide interconnection for Execunet or requires the Commission to take immediate action to impose such an obligation upon AT&T.[9] MCI has filed a document entitled "Petition for Compliance with Mandate of the Court of Appeals for the District of Columbia Circuit by Enforcing MCI's Right to Local Interconnection for Execunet Services" which has been incorporated by reference in MCI's comments in the instant proceeding. That petition asks this Commission to issue an order directing AT&T to provide the interconnections MCI requires to provide Execunet and all "other authorized services."

66. Although AT&T did intervene as a party in the review proceedings in the *Execunet* case, the Court of Appeals mandate does not direct AT&T to do anything. The judgment states "that the orders of the Federal Communications Commission on review herein are hereby reversed, and this case is hereby remanded to the Federal Communications Commission for further proceeding in accordance with the opinion of this Court filed herein this date."

67. The Commission orders in the *Execunet* case did not relate to interconnection. No interconnection question was presented in the Commission proceedings or the review proceedings and neither the Commission decisions nor the Court of Appeals opinion purports to discuss the nature of AT&T's interconnection obligations.

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[9] The SPC and SBS comments present similar contentions.

68. MCI's contention appears to be based on the premise that the Court of Appeals has determined that Execunet service is desirable and has decreed that no one should take any action which will frustrate MCI's efforts to provide Execunet service. That premise is incorrect. The Court of Appeals opinion says: "[W]e have not had to consider, and have not considered whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide . . . ." 561 F.2d at 380.

B. *The Sherman Act*

69. MCI, SPC and the Department of Justice have expressed the view that AT&T's refusal to provide interconnection to MCI and others may violate the antitrust laws. AT&T's petition at least implicitly requests that we determine that question inasmuch as it seeks a ruling that AT&T has no obligation to provide interconnection for Execunet and other similar services. While we must and do refuse to sanction AT&T's overly-broad language, we must also decline to rule on the antitrust issue. Although we do consider the basic policies of the antitrust laws in the context of "public interest" determinations [10] and we do have some enforcement responsibilities under Section 2, 3, 7 and 8 of the Clayton Act, 15 U.S.C. 13, 14, 18 and 19, we do not have authority to enforce the Sherman Act, 15 U.S.C. 1-7. *See United States* v. *Radio Corp. of America*, 358 U.S. 334, 339-46 (1959); c.f., *United States* v. *Pacific & A.R. & Nav. Co.*, 228 U.S. 87, 105 (1913). The comments do not clearly identify the statutory basis for any antitrust claim based on AT&T's refusal to interconnect, but MCI, SPC and Justice appear to be relying upon Sherman Act cases. For example, SPC relies upon a statement in *United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D.Minn. 1971), *affirmed*, 410 U.S. 366 (1973) that "[t]he Sherman Act requires that where facilities cannot practically be dupli-

[10] In this instance we are not making such a public interest determination, that will be made in the context of another proceeding.

cated by would-be competitors, those in possession of them must allow them to be shared on fair terms." We could not make a definitive determination that AT&T's present course of conduct does or does not violate the Sherman Act.[11]

C. *The Communications Act*

70. SPS claims that the first clause of Section 201(a) of the Communications Act imposes a duty to interconnect apart from a Section 201(a) order. The first clause states: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor;" . . . The Section continues: "and in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connection with other carriers, to establish through routes and charges applicable thereto and the division of such charges, and to establish and provide facilities and regulations for operating such through routes." AT&T claims that the first clause is limited to ultimate users of communication services and that its obligations to other carriers are governed exclusively by the second clause. Neither SPC nor AT&T cites any authority to support its interpretation.

71. If the first clause of Section 201(a) automatically imposed a duty to interconnect for any service the requesting carrier may lawfully provide the second clause of that subsection would be superfluous. A construction of a statutory provision which renders one clause of the provision superfluous "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to

[11] We believe that it would also be inappropriate for us to attempt to determine the scope of AT&T's interconnection obligations, if any, under any legal standards other than those embodied in the Communications Act.

be given effect." *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973). Accordingly, the first clause of Section 201(a) cannot be interpreted to require a carrier to grant every interconnection request from another carrier to provide an interstate communications service.

72. However, it does not follow that the first clause never imposes a duty to provide services to another carrier in the absence of a Commission order under the second clause of Section 201(a). If a carrier files a tariff describing services which it will provide to other carriers it has a duty to provide such services even if the tariff filing was not compelled by a Section 201(a) order. A refusal to provide tariffed services upon request would violate the first clause of Section 201(a) and Section 203.

73. AT&T has filed a tariff describing the services and facilities which it furnishes to other carriers. That tariff provides for a variety of dedicated local loops, intra and inter-exchange lines, and other facilities and interconnections which may be required to complete a wide range of specialized and private line service offerings. However, it does not offer any facility or any interconnection with local exchange facilities or services of a type which specialized common carriers could utilize to provide Execunet or any similar service. The local operating company facilities which MCI presently utilizes to provide Execunet were apparently obtained pursuant to local exchange service tariffs which have not been filed with this Commission. Therefore, a refusal to provide additional interconnections for Execunet and similar services would not violate the first clause of Section 201(a) or Section 203.

74. Some comments opposing the AT&T petition contend that Bell operating companies which refuse to interconnect with specialized common carriers for the provision of Execunet or similar services are discriminating in favor of AT&T Long Lines. Such comments may be intended as a contention that AT&T's action violates Section 202(a) of

the Communications Act, 47 U.S.C. § 202(a), which provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

75. The services which local operating companies have been providing to MCI for Execunet service have not been furnished on terms which could be compared to the allocation of interstate toll service revenue between AT&T Long Line and local operating companies. It is our understanding that neither MCI nor any other specialized common carrier has ever requested that interconnection facilities be provided on some basis which could provide the local operating company with the same revenue it would receive if the specialized common carriers' customers utilized MTS or WATS service. Under these circumstances, a refusal to interconnect does not arguably subject the specialized common carriers to an "unreasonable prejudice or disadvantage" *vis-a-vis* AT&T's Long Lines Department.

76. We have not determined whether Section 202(a) could impose an interconnection obligation apart from a Section 201(a) order if a specialized common carrier did request interconnection upon terms which are substantially equivalent to WATS or MTS from the local operating company's perspective. That question appears to be purely hypothetical under the present circumstances.

V. Affirmative Action

77. USITA and Continental have suggested that we should act to inhibit the expansion of Execunet and similar services until we can complete necessary proceedings to determine whether competition in the MTS-WATS market is or is not in the public interest. Such suggestions are contained both in comments filed in this proceeding and in a separate petition which Continental filed on January 25, 1978. Some of the other comments have expressed the view that any affirmative action by this Commission which is designed to preserve the *status quo* would be undesirable and/or unlawful.

78. Such affirmative action requests are beyond the scope of this particular proceeding. Accordingly, we have not considered contentions with respect to the desirability or undesirability of preserving the *status quo* or the extent of our power, if any, to accomplish that result. Our actions herein are directed solely to the clarification of the telephone industries' obligations under the Communications Act to provide interconnection of the type apparently required to complete Execunet-type services.

Conclusions

79. The Petition for a Declaratory Ruling is granted insofar as it requests a determination with respect to the scope of the petitioners' interconnection obligations to specialized common carriers under prior orders of this Commission issued pursuant to Section 201(a) of the Communications Act. We conclude that our prior Section 201(a) orders do not direct the petitioners to provide interconnection of facilities or services to any specialized common carrier to enable such a specialized common carrier to provide any service which is substantially equivalent to MTS or WATS.

80. The Petition for Declaratory Ruling is granted insofar as it requests a determination with respect to the

effect of the Court of Appeals mandate in *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, —— U.S. —— (No. 77-420, 46 U.S.L.W. 3448 (January 16, 1978)), upon the scope of petitioners' interconnection obligations to specialized common carriers. We conclude that the Court of Appeals mandate in that case has no effect upon the scope of petitioners' interconnection obligations.

81. The Petition for a Declaratory Ruling is granted insofar as it requests a determination of the scope of petitioners' interconnection obligations to specialized carriers under the first clause of Section 201(a) and Section 203 of the Communications Act. We conclude that the first clause of Section 201(a) and Section 203 do not impose any obligation upon petitioners to furnish facilities or services to specialized common carriers which are not described in an effective tariff filed with this Commission.

82. The Petition for a Declaratory Ruling is granted in part insofar as it requests a determination with respect to the scope of petitioners' interconnection obligations to specialized common carriers under Section 202(a) of the Communications Act. We conclude that Section 202(a) does not impose any obligation upon local operating companies which interconnect with an interstate carrier to provide a through service to interconnect with a second interstate carrier to provide a through service if the second carrier fails to offer compensation to the local operating companies which is comparable to the compensation the local operating companies receive from the first carrier.

83. The Petition for a Declaratory Ruling is denied insofar as it requests a determination with respect to the scope of petitioner's interconnection obligations to specialized common carriers, if any, under the Sherman Act, the common law, or any federal or state statute other than the Communications Act.

ORDER

84. IT IS ORDERED, That the Petition for a Declaratory Ruling IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Separate Statement of Chairman Charles D. Ferris

RE: Southern Pacific Communications Company Tariff Revisions, Inquiry into MTS and WATS Market Structure, and Petition of American Telephone and Telegraph Company for Declaratory Ruling

I join in the three related opinions the Commission adopts today with regard to telephone service competition and interconnection because I believe they are responsible approaches to difficult and vital policy questions and because I am convinced that they apply the law correctly. Although I subscribe fully to the rationale stated in the opinions, I add my separate remarks as a personal overview of where we are in telephone service competition and where I believe we are going.

I. WHERE WE ARE.

For about ten years now, the Commission has been opening segments of the interstate and foreign communications market to competition. Starting with an industry that traditionally had been monopolistic, the Commission has looked to see where competition would serve the public and has taken the appropriate regulatory steps to make that competition possible. In 1969, my predecessors here authorized MCI to get into the intercity private line service business on the Chicago-St. Louis route.[1] Two years

[1] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), 21 FCC 2d 190 (1970).

later, at the end of a broad policy-making proceeding, the Commission adopted its specialized common carrier decision, opening a substantial segment of the specialized intercity communications market to competition nationwide.[2] In 1972, the Commission extended the same policy to the domestic satellite communications industry, which appeared to be on the verge of exploiting new space technology in a manner that could revolutionize voice and data communications in this country.[3] In 1976, the Commission removed the monopoly carriers' restrictions on "resale and sharing" of private line services to open the way (1) for brokerage of communications service in competition with the established carriers and (2) for more flexible sharing arrangements in which small users will be able to pool their needs and buy large packages of services to be shared according to individual needs at lower unit costs.[4]

While I cannot share in the credit for these initiatives because I came to the Commission only recently, I applaud and enthusiastically endorse them.[5] I firmly believe that the marketplace should have as big a voice as possible in deciding such questions as the rates to be charged for

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[2] *Specialized Common Carrier Services*, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 153 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[3] *Domestic Communications-Satellite Facilities*, 35 FCC 2d 844, 38 FCC 2d 665 (1972).

[4] *Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T* v. *FCC*, No. 77-4057, 2d Circuit (decided January 26, 1978).

[5] I also am proud of this agency's initiatives in the area of terminal equipment competition. *See, e.g., Interstate and Foreign Message Toll Telephone Service*, 56 FCC 2d 593 (1975), 58 FCC 2d 736 (1976), *aff'd sub nom. North Carolina Util. Comm.* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 46 U.S.L.Wk. 3219 (October 3, 1977).

services, what kinds of services will be offered, and who shall serve. Moreover, I am committed to extension of our present policies favoring competition to any area of communications in which we can conscientiously and responsibly find that such competition would benefit the public.

Having said this much, I must go back and underscore the words "conscientiously" and "responsibly." Our mandate under the Communications Act is to establish policy and implement it in such a way as to ensure a rapid and efficient communications system in this country at reasonable charges to the public.[6] As I understand that mandate, it requires us to evaluate the consequences of significant regulatory actions so that we are in a position to make knowledgeable decisions. That is why the so-called "expert" agency was created.

The Commission, I believe, has been faithful to that mandate in developing the policies that have opened selected common carrier markets to competition. It has conscientiously and responsibly evaluated the possible public costs and benefits of competition in discrete services and technologies, and has made significant and orderly progress toward opening this historically monopoly market.

The matters that are before us today challenge our resolve to maintain control of the developing competition. As a result of the District of Columbia Circuit's ruling in the *Execunet* case,[7] the specialized carriers now have authority to provide classes of service (with their existing facilities) that the Commission never has evaluated for purposes of deciding whether competition will serve the public interest. This resulted, in the Court's view, from the Commission's failure in its seminal specialized common carrier proceeding to take the appropriate procedural

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[6] 47 U.S.C. § 151.

[7] *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L. Wk. 3448 (January 16, 1978).

steps and make the requisite findings that would justify restrictions on the carriers' service offerings. I do not agree with the Court's ruling, but that is beside the point. The Supreme Court declined to grant our petition for writ of certiorari, and we are thus bound to respect the mandate of the Court of Appeals.

I do not understand the Court's mandate, however, as requiring us to abdicate our continuing responsibility to evaluate the role of competition in common carrier markets before we take regulatory actions. Nor do I understand the *Execunet* opinion to have vitiated the decision of the Third Circuit in the *Bell of Pennsylvania* case,[8] which construed our orders requiring AT&T to interconnect with the specialized common carriers as limited to private line services. I regard our decisions today as consistent with our obligations under the mandates of both Courts. Moreover, I view these actions as consistent with our obligations under the Communications Act and as a reassertion of our commitment to orderly consideration of the vital public interest questions surrounding the competitive offering of communications services.

First, we are rejecting the tariff of Southern Pacific Communications Co., which would offer an MTS-like service despite the absence of requisite interconnection privileges, because we have not decided as a matter of policy whether the public interest requires such interconnection. Second, we are declaring that AT&T has no present obligation under any of our outstanding orders to interconnect with the specialized carriers for purposes of providing MTS and WATS services, because, once again, we have not decided as a matter of policy whether the public inter-

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[8] *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975). The Third Circuit affirmed and construed the Commission's order in *Bell System Tariff Offerings*, 46 FCC 2d 412 (1974).

est requires such interconnection. Third, we are initiating a new rulemaking proceeding to determine, on an appropriate record, whether we should open MTS and WATS to competition, and, if so, whether to require interconnection with the telephone companies.

I have struggled with the issues raised by these three items and have considered all the possible alternatives. In the end, there simply is no way to get around the crucial facts that (1) the services involved in the Southern Pacific tariff and the AT&T petition for declaratory ruling are not private line but are the functional equivalent of MTS or WATS, and (2) our outstanding orders requiring AT&T to interconnect with the specialized carriers, as construed and affirmed by the Third Circuit,[9] do not provide the basis for interconnection with services that are not private line. In those circumstances, the only intellectually honest decision was to grant AT&T's request for declaratory ruling and recognize the flaw in Southern Pacific's tariff.

There were possible options for dealing with Southern Pacific. Instead of rejecting, we might arguably have suspended the tariff for five months pending an *ad hoc* hearing on its claim to interconnection rights. Or we might have allowed the tariff to become "effective" with a notation that the service could not actually be provided unless and until Southern Pacific acquired the requisite interconnection. But the practical result would have been the same: Southern Pacific could not have offered or provided the service without getting interconnection with the essential terminal facilities. Our order rejecting the tariff without prejudice to refiling seems to me to be a more straightforward and a cleaner resolution of the matter than either of the options, both of which are legally suspect at best.[10]

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[9] *Bell Telephone Co. of Penn.* v. *FCC*, 503 F.2d at 1273-74.

[10] Without going into detail, I point out that hearings on tariffs normally do not go into such public interest questions as whether

These actions are not a retreat from our sound policy favoring competition where it is feasible; nor do they constitute a freeze or a lid on further expansion of competition, since they leave unimpaired the carriers' ability to develop new private line services. Rather, they recognize our need to compile the appropriate record for making decisions that may affect the quality and price of communications for many years to come. I believe this is entirely consistent with the Court's mandate in the *Execunet* case.

II. Where We Are Going.

In its concluding paragraph, in *Execunet,* the Court of Appeals stated:

> [W]e have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings. In that eventuality the Commission must be ever mindful that, just as it is not free to create competition for competition's sake, it is not free to propagate monopoly for monopoly's sake. The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of *de facto* monopoly.

MCI Telecommunications Corp. v. *FCC,* 561 F.2d at 380. I have absolutely no quarrel with this statement; in fact, I wish I had said it myself.

But the statement reveals a crucial truth: Neither the Court nor this agency ever has considered "whether com-

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interconnection should be ordered. *Compare* 47 U.S.C. § 204 *with* 47 U.S.C. § 201(a). I point out also the fiction in allowing a tariff to become "effective" even though the carrier as a practical matter cannot provide the service the tariff purports to offer. *See* 47 U.S.C. §§ 201(a), 203.

petition like that posed by Execunet is in the public interest." Yet, it is evident that someone must consider that question if we are to have a competition policy that rests on sound evaluation of the consequences of various alternatives.

We have begun that evaluation in the inquiry initiated today. The very fact that we are looking into MTS and WATS, in my view, means that we are meeting the toughest problems head-on. Our inquiry will address all aspects of whether sound public interest objectives would be served by a continuation of the *de facto* monopoly in MTS and WATS, full competition in those services, or some middle position.

The approach we are taking in the inquiry will enable us to get away from the tedious task of deciding whether particular services fit into the definition of private line. It is my hope that we will be able to isolate those services —if any—that are to remain free from competition for now, and that the questions we will face in future *ad hoc* disputes will go to whether the proposed services are in the zone we have not yet opened to competition. This still may involve scrutiny of service characteristics and comparisons with definitions; but our inquiry should result in definitions that are specific enough to resolve all but the closest cases almost ministerially.

The inquiry will visit the crucial policy issues outlined in today's notice, including questions about separations and settlements and the possible impact of MTS and WATS competition on local rates and on national rate averaging. It will also consider ways to minimize that impact, if the record established that there will be any, so that competition may extend as far as possible consistently with the public interest. We will not entertain any presumptions in favor of continuing any *de facto* monopoly situations;[11]

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[11] *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d at 380.

nor will we create or promote competition for its own sake.[12] Our sole guide and objective must be the public interest.

In the meantime, we will entertain petitions for *ad hoc* consideration of requests for interconnection for discrete services over particular routes, such as the services and routes contemplated in Southern Pacific's tariff. I have no intention of allowing our competitive initiatives to grind to a halt while we consider pushing the frontiers still farther. I also expect—and will demand—that the inquiry and any *ad hoc* proceedings move forward expeditiously and that no interested party benefit from delay.

I fully expect these actions to be challenged in Court. For myself, I welcome judicial review in this instance, because I believe the reviewing Court will recognize and respect our need to do our job. We have no authority to abdicate our responsibilities under the Communications Act.[13] We also have no desire to do so.

This Commission's policies over the past decade of introducing competition into a monopoly market have been highly innovative and reflect a significant departure from traditional utility regulation. These policies have significantly changed the status quo in the telephone industry and resulted in new services and benefits to the public. They have also resulted both in rethinking of old assumptions and in resistance to new ideas and change.

The courts and the Congress have given attention to these important public policy developments, as it is their role to do. I am committed, however, to assuring that this

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[12] *Id. See also FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771, 776-77 (D.C. Cir. 1974).

[13] *AT&T* v. *FCC*, No. 77-4057, Second Circuit, *slip opinion*, p. 6549. *Cf. Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380 (1974).

agency carry out effectively its responsibilities as the expert agency in this dynamic field within its present flexible mandate from the Congress and within the framework of judicial oversight.

Dissenting Statement of Commissioner Joseph R. Fogarty

The Commission today grants in part a Petition for Declaratory Ruling filed by American Telephone and Telegraph Company and rejects a proposed tariff for SPRINT Option V filed by Southern Pacific Communications Company. This action is based upon a misreading of both the letter and spirit of the U.S. Court of Appeals for the District of Columbia Circuit *Execunet* decision,[1] and, from that Court's interpretation of the *Specialized Common Carrier* decision.[2] Therefore, I dissent. I would find that AT&T must provide the necessary interconnections to allow MCI and SPC to use their existing facilities to offer those services which the *Execunet* court found MCI may offer. In addition, I would find no ground under which we can lawfully reject the SPRINT V tariff, since necessary interconnections are mandated.

Our 1971 *Specialized Common Carrier* decision declared our policy favoring "full and fair competition" among established and new "specialized" carriers for the provision of "specialized common carrier services." Both in that case and in the subsequent *Bell System Tariff Offerings*,[3] we determined that the specialized carriers were

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[1] *MCI Telecommunications Corp.* v. *FCC*, 561 F. 2d 365 (D.C. Cir., 1977), cert. denied, 46 U.S.L.W. 3448 (1978).

[2] 29 FCC 2d 870 (1971), aff'd sub nom *Washington Utilities and Transportation Comm.* v. *FCC*, 513 F. 2d 1142 (9th Cir., 1975), cert. denied, 423 U.S. 836 (1975).

[3] 46 FCC 2d 413 (1974), aff'd sub nom *Bell Tel. Co of Pa.* v. *FCC*, 503 F. 2d 1250 (3d Cir., (1974)), cert. denied, 422 U.S. 1026 (1975).

limited to the offering of specialized private line services. *See MCI Telecommunications Corp.*, 60 FCC 2d 25, 36 (1976).

When MCI sought interconnection with the Bell System Operating Companies for the provision of end-to-end foreign exchange (FX) and common control switching arrangement (CCSA) services, we found that the *Specialized Carrier* decision could reasonably be read to grant those Section 201(a) interconnections "essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communication services." 46 FCC 2d at 438.

AT&T asserted in the appeal of *Bell System Tariff Offerings* that our opinion was "somewhat vague and, to a certain extent, overbroad." 503 F. 2d at 1273. The Third Circuit held, however, that the interconnection requirements must be read in the context of the *Specialized Common Carrier* decision itself. "Orders are not to be read in a vacuum, but rather must be read and interpreted in the context in which they appear." *Id.* The apparent interpretation given the *Specialized Carrier* decision in the Third Circuit was that the specialized carriers were authorized therein to offer only specialized, *private line* services, and that interconnection must be granted for the offering of these authorized services, and only for these services. If the law had remained static since that time, I would agree with AT&T that it is under no obligation to interconnect for the provision of Execunet-type services.

The law has not remained static, however, but rather the D.C. Circuit has added a new dimension—a new interpretation of the *Specialized Common Carrier* decision. In *Execunet,* the Court ruled that the specialized carriers are *not* limited in the services which they may offer, except as to the technical limitations of their authorized facilities.

Rather, "MCI's facility authorizations are not restricted and therefore its tariff applications could not properly be rejected." 561 F. 2d at 379. Although I disagree with the Court's reading of our *Specialized Carrier* decision, as I believe that the Commission lawfully limited the specialized carriers to the offering of private line services, the Court of Appeals has spoken and the Supreme Court has declined review. We are bound, therefore, by the law of the case, and we are now required to interpret the *Specialized Carrier* decision in the light of the D.C. Circuit's *Execunet* holding.

Execunet determined that we cannot impose any restriction on the services which the specialized carriers are authorized to offer unless we "affirmatively determine . . . that 'the public convenience and necessity [so] require.'" 561 F. 2d at 377. We made no such determination in *Specialized Common Carriers*, and therefore could not lawfully reject the Execunet tariff. Clearly, the D.C. Circuit's findings would be a nullity were we to deny interconnection necessary for provision of such services. *Bell System Tariff Offerings* held that *Specialized Common Carriers* mandated interconnections necessary for services authorized therein, and the *Execunet* court found those services unrestricted. Since Execunet-type services are presently authorized, these cases read together mandate interconnection.

SPRINT Option V, a service virtually identical to Execunet, must also be found to be authorized. Following the analysis with regard to Execunet, necessary interconnections must also be provided for the offering of end-to-end SPRINT V service, and the Commission's justification for rejection fails.

We have before us a separate petition filed by Continental Telephone Company and supported by the U.S. Independent Telephone Association requesting us to prohibit any expansion of Execunet pending completion of a

proceeding on MTS/WATS market structure. Without reaching the question of whether we can lawfully grant the relief Continental requests, I believe that no such order is required. If MCI, SPC and other specialized carriers offered Execunet-type services over all *existing* facilities, no significant harm can reasonably be anticipated. There is simply insufficient capacity to constitute an economic threat to established telephone companies and their subscribers. Until the market structure proceeding is completed, however, we should not grant the specialized common carriers any additional facilities unless they agree not to expand their Execunet-type offerings. This will avoid any possibility of adverse economic impact pending a firm MTS/WATS market structure determination.

In view of this lack of potential adverse economic impact, it is clear to me that we have not lost control over the interstate telecommunications industry, as has been alleged. By restricting the provision of Execunet-type services to presently authorized facilities, we are holding a tight rein over the extent of these services, both in terms of cities served and customers that can be accommodated within existing service areas. Therefore, pending a determination as to any appropriate revisions to the industry structure, and pending a determination as to any necessary revisions to the separations process, we remain in full control of the market, and no prohibition against expansion of Execunet-type services over existing authorized facilities is required.

Therefore, from both a legal and a policy viewpoint, I believe that AT&T's petition should be denied, SPRINT V should be permitted to become effective, and we should impose a moratorium on additional facility authorizations pending a final market structure determination.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 75-1635

MCI Telecommunications Corporation,
Microwave Communications, Inc. and
N-Triple-C Inc., Petitioners

v.

Federal Communications Commission and
United States of America, Respondents

American Telephone and Telegraph Co., et al,
Intervenors

Before: WRIGHT, Chief Judge; TAMM and WILKEY,
Circuit Judges

(FILED APRIL 14, 1978)

Order

Upon consideration of petitioners' motion requesting this Court to enter an order directing compliance with this Court's mandate previously issued in this proceeding, of petitioners' motion for expedited consideration, of the oppositions of intervenors United States Independent Telephone Association and American Telephone and Telegraph Company, of the response of intervenor Southern Pacific Communications Company, of petitioners' supplements to their motion, of the response of respondent Commission, of the reply of intervenor United States Independent Telephone Association to the response of Southern Pacific Communications Company, of petitioners' reply to the opposition of American Telephone and Telegraph Company, of the supplemental opposition of American Telephone and Telegraph Company to the response of intervenor Southern Pacific Communications Company to the petitioners' motion, of

the reply of intervenor Southern Pacific Communications Company to the various oppositions, and of the letter of counsel for respondent Commission advising of additional authorities, it is

ORDERED by the Court that petitioners' motion for an order directing compliance with the mandate of this Court, previously issued, is granted for the reasons set forth in the Opinion for the Court filed herein this date.

Per Curiam
For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 75-1635

MCI Telecommunications Corporation,
Microwave Communications, Inc. and
N-Triple-C Inc., Petitioners

v.

Federal Communications Commission and
United States of America, Respondents

American Telephone and Telegraph Co., et al,
Intervenors

Before: WRIGHT, Chief Judge; TAMM and WILKEY,
Circuit Judges

(FILED MAY 8, 1978)

Order

Upon consideration of the petitions for rehearing filed by respondent Federal Communications Commission and intervenors American Telephone and Telegraph Co. and United States Independent Telephone Association, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam
For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 75-1635

MCI Telecommunications Corporation,
Microwave Communications, Inc. and
N-Triple-C Inc., Petitioners

v.

Federal Communications Commission and
United States of America, Respondents

American Telephone and Telegraph Co., et al,
Intervenors

Before: WRIGHT, Chief Judge; BAZELON, TAMM, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges

(FILED MAY 8, 1978)

Order

The suggestions for rehearing *en banc* filed by respondent Federal Communications Commission and intervenors American Telephone and Telegraph Co. and United States Independent Telephone Association, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam
For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX F

Section 201(a) of the Communications Act, as amended, 47 U.S.C. § 201(a), provides:

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Section 214 of the Communications Act, as amended, 47 U.S.C. § 214, provides:

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this Act: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there

shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment and the public convenience and necessity may require. After issuance of such certificate, and

not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

The Hobbs Act, 28 U.S.C. § 2349, provides:

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any

court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.

APPENDIX G

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA and the American Telephone and Telegraph Company, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and The United States of America, Respondents,

MCI Telecommunications Corporation and MCI-New York West, Inc., et al., Intervenors.

No. 74-1386.

Argued June 27, 1974.

Decided Sept. 11, 1974.

Before HASTIE, WEIS and GARTH, Circuit Judges.

Opinion of the Court

GARTH, Circuit Judge.

Petitioners Bell Telephone Company of Pennsylvania and American Telephone and Telegraph Company call upon us to review[1] an order of the Federal Communications Commission dated April 23, 1974 (FCC Docket No. 19896).[2] The order, relevant portions of which are found in the appendix to this opinion, essentially requires the petitioners to provide certain communications services and facilities to other carriers and prohibits the petitioners from engaging in discriminatory practices. Specifically, the first two paragraphs of the order (¶ 53-54) require the American Telephone and Telegraph Company and affiliated Bell System companies (hereinafter "A T & T") to

[1] Our jurisdiction to review the FCC order is predicated upon 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

[2] The order and supporting decision are published at 46 F.C.C. 2d 413 (1974).

furnish to MCI Telecommunications Corp. (MCI) and to all other specialized common carriers the interconnection facilities necessary to provide private line services.[3] The order requires that A T & T must provide the interconnection necessary for the delivery of two particular elements of private line service, Foreign Exchange service (FX) and Common Control Switching Arrangement.[4] The

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[3] A "specialized" common carrier is a carrier that does not provide the full range of communications services contemplated by the Communications Act, 47 U.S.C. § 151 et seq. For the purposes of this opinion, the phrase "specialized common carrier" shall refer to carriers who specialize in "private line services."

"Private line service" provides the large-scale telephone customer with full-time private circuits for the transmission of communications between locations specified by the customer. The service operates to give the customer continuous communication without requiring the carrier to establish a new connection for each call or message.

[4] "FX" and "CCSA" are defined by the Federal Communications Commission as follows: Foreign exchange (FX) is a private line service that is partially 'switched'. It allows a businessman located in one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area. A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises. The private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customers. However, the switching machines are shared with other private line service customers.

order further directs A T & T to cease and desist from practices which delay interconnection for the specialized common carriers and which deny services to these carriers on a par with A T & T's own private lines service division, the Long Lines Department. The third paragraph of the order (¶ 55) rejects tariffs submitted by A T & T to the extent that such tariffs are inconsistent with prior contracts entered into between A T & T and Western Union.

Inasmuch as the two matters before the Commission involve completely distinct legal issues, we shall treat the issues separately.

I. *FX and CCSA*

A. *Background*

To evaluate the FCC's mandate regarding FX and CCSA, it is necessary to examine the agency's prior involvement with the specialized common carriers. The Commission first considered the provision of private line services by specialized common carriers in In re Applications of Microwave Communications, Inc., 18 F.C.C.2d 953 (1969) (Docket No. 16509), reconsideration denied, 21 F.C.C.2d 190 (1970). MCI had proposed to construct facilities for the development of interoffice and interplant communication between St. Louis and Chicago. MCI agreed to be responsible only for the transmissions between microwave transmitters, leaving it to the individual customers to arrange for "loop service" (i. e. interconnection between MCI's transmitter/receiving terminals and the customer's own equipment). Concluding that it would be inconsistent with the public interest to deny MCI's applications, the Commission granted construction permits for this proposed point-to-point service. Recognizing that MCI's cus-

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46 F.C.C.2d at 418, n. 5 (1974). *See also* MCI Communications Corp. v. American Telephone & Telegraph Co., 496 F.2d 214, 216 n. 5 (3d Cir. 1974).

tomers might have difficulties in obtaining loop service, the FCC declared:

> Since [the existing carriers] have indicated that they will not voluntarily provide loop service, we shall retain jurisdiction of this proceeding in order to enable MCI to obtain from the Commission a prompt determination on the matter of interconnection. Thus, at such time as MCI has customers and the facts and details of the customers' requirements are known, MCI may come directly to the Commission with a request for an order of interconnection.

18 F.C.C.2d at 965 (1969).

Less than two years later, the FCC conducted a full-scale investigation into the provision of private line services. *See* Specialized Common Carrier Services, 29 F.C.C.2d 850 (Docket No. 18920), reconsideration denied, 31 F.C.C.2d 1106 (1971). The Notice of Proposed Rule Making, issued in 1970, indicated that the FCC was concerned with five basic issues:

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and if so:
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> B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances;
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> C. What standards, procedures and/or rules should be adopted with respect to such technical matters as the avoidance of interference to domestic communications satellites in the 6 GHz band, the avoidance or resolution of terrestrial frequency conflicts and route blockages both vis-a-vis the facilities of established carriers and among the applicants, and the use of frequency diversity;

D. Whether some measure of protection to the applicants' subscribers is called for in the area of quality and reliability of service; and

E. What is the appropriate means for local distribution of the proposed services?

24 F.C.C.2d 318 (1970). Of these five issues, the first and last have special relevance to the instant proceedings. As to issue "A", the Commission concluded that:

> . . . there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

29 F.C.C.2d at 920 (1971). The Commission's conclusion with regard to issue "E" was as follows:

> We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show fa-

> voritism among competitors." In view of the representations of A T & T and G T & E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision.

29 F.C.C.2d at 940 (1971).

A T & T did not appeal the order entered in *Specialized Common Carrier Services.*[5] Presumably as a result of this 1971 decision, A T & T and MCI began negotiating for the provision of interconnection services. However, in the late summer of 1973, A T & T and its affiliates broke off negotiations with MCI and submitted tariffs to public utility commissions in each of the states in which MCI sought interconnection. Pending approval of these tariffs, A T & T announced that it would not provide interconnection to MCI if such services "terminated" in A T & T supplied equipment.

On August 27, 1973, MCI wrote to the FCC, requesting that the Commission advise A T & T that:

> (1) the [A T & T] affiliates providing services for the St. Louis-Chicago route are required to interconnect with MCI "in the provision of the interstate service which MCI is authorized by the FCC to provide";
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> (2) A T & T must provide interconnection services to MCI on the same terms that such services are provided to Western Union and the Long Lines Department of A T & T; and

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[5] An appeal was taken, however, by other interested parties. This appeal is still pending in the Ninth Circuit as Washington UTC v. FCC (No. 71-2919) and as NARUC v. FCC (No. 72-1198).

(3) A T & T may not resort to state regulatory commissions as a method of delaying the provision of authorized services.

The Commission's response was prepared by Bernard Strassburg, Chief of the Common Carrier Bureau. In a letter to A T & T (dated August 31, 1973), Mr. Strassburg, after quoting from the *MCI* (Docket 16509) and *Specialized Common Carrier Services* (Docket 18920) decisions discussed above, stated that:

> ". . . [I]t is our view that, as requested by MCI, the associated Bell companies are required to permit interconnection or provide local channel arrangements to MCI. As the Commission also stressed in its *MCI* and *Specialized Common Carrier* decisions, the Bell companies must treat MCI no less favorably in interconnecting its facilities than they do now for the Long Lines Department of A T & T or Western Union. It should also be apparent that the Associated Bell companies are not required to obtain approval from any state or local regulatory agency of any contract or tariff before they may provide interstate services or facilities to MCI for its interstate services."

Strassburg also informed A T & T that it was obligated to provide "local distribution services" (i. e. looping service; *see* p. 3, *supra*) to MCI customers in Chicago and St. Louis.

A T & T answered Strassburg's letter on September 5, 1973. A T & T informed the Commission that it would provide local loop service to MCI, but that it could do so only after first receiving clearance from the appropriate state regulatory commissions. A T & T further declared that it had no intention of participating in a "through service" with MCI, Western Union, or any other private lines carrier. On September 28, 1973, A T & T reaffirmed its commitment to proceed first before the state commissions, noting that it had filed tariffs that would equalize rates amongst

all private line carriers other than its Long Lines Department.

On October 4, 1973, the FCC Chairman responded by issuing a letter order informing A T & T that it was required to submit the tariffs to the FCC, and not to the state regulatory commissions. With regard to interconnection, the FCC stated that the *MCI* and *Specialized Common Carrier Services* decisions directed A T & T to provide "for interconnection facilities required by [specialized] carriers to terminate the services" authorized by the Commission. Furthermore, the Chairman wrote that:

> "... [I]t has been alleged that it has been the policy of the local companies of the Bell System not to furnish exchange facilities to specialized carriers or their customers for certain services which those carriers are authorized to provide and which would be in direct competition with services offered by A. T. & T. It is not at all clear from your letter that the proposed tariffs would remove this apparent discrimination as between the treatment of A. T. & T. services, on the one hand, and authorized services of the specialized carriers, on the other hand. . . . We are of the view that effective implementation of our policy objectives and the statutory scheme of the Communications Act require that you promptly file tariff schedules with this Commission in accordance with Section 203 of the Communications Act, which tariff schedules will provide the interconnection facilities essential to the rendition by the specialized carriers of all their authorized services on terms and conditions which are just, reasonable and non-discriminatory. Until such tariffs are filed and effective, there should be no delay in honoring requests of specialized carriers for interconnection facilities required by such carriers to terminate the services they are authorized by the Commission to furnish. Such facilities can be provided under contracts on an interim basis and we assume that this will be done."

(A. 29-30).

MCI requested clarification of this order. On October 19, 1973, Bernard Strassburg informed MCI that the October 4th order contemplated A T & T's providing FX, CCSA, and other related services to the specialized carriers.[6] A T & T thereupon petitioned for review of the October 4th order before the Second Circuit.[7]

Buoyed by Mr. Strassburg's interpretation of the FCC's orders, MCI commenced an action (on November 2, 1973) in the District Court for the Eastern District of Pennsylvania to compel A T & T to provide FX, CCSA, and other related services. Jurisdiction was predicated upon 47 U.S.C. § 406.[8] While the matter was pending before the district

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[6] We mention this October 19th letter only to provide a complete procedural background. The Commission did not rely upon this letter in reaching its conclusions below, 46 F.C.C.2d at 430, and similarly we give no weight to the letter in the substantive portions of this opinion.

[7] The Second Circuit transferred AT&T's appeal (from the October 4th order) to this Court. The transferred case, docketed as No. 74-1306, has not yet been argued.

[8] 47 U.S.C. § 406 provides that:

> The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may

court, however, the Federal Communications Commission spoke again. On December 13, 1973, the agency released a memorandum opinion and order to show cause. *See* In the Matter of Bell System Tariff Offerings, 44 F.C.C.2d 245 (Docket No. 19896), *modified* 44 F.C.C.2d 914 (January 25, 1974). In its memorandum opinion, the FCC revealed that it had received requests for administrative action from A T & T (challenging the October 19, 1973 Strassburg letter) and from Western Union (seeking to prevent A T & T from proceeding before state regulatory bodies). Construing the requests as raising questions "concerning the lawfulness of the actions taken by A T & T and the Bell System companies with respect to the provision of interconnection facilities. . . .", the Commission designated March 4, 1974 for oral argument on these questions. In paragraph 19 of the opinion and order, the FCC declared that:

> It Is Further Ordered, That the parties shall address themselves to the questions of whether (1) the Commission has heretofore ordered the telephone companies, pursuant to Section 201(a) of the Communications Act, to provide interconnection with MCI or whether such interconnection is otherwise required within the meaning of Section 312 of the Act; (2) if so, (a) the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI; (b) whether the telephone companies have complied with such order, rule or regulation and, (c) if they have not complied, the appropriate remedy, whether under section 312 of the Act or otherwise; (3) if interconnection has not hitherto been ordered or required by rule or regula-

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think proper pending the determination of the question of fact: *Provided further,* That the remedy given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter.

> tion whether it should be and if so, upon what terms and conditions; and (4) whether the Commission should affirm, reverse or modify the Staff action of October 19, 1973 for which review is here requested.

44 F.C.C.2d at 251-252.

Prior to the date of oral argument before the Commission, the district court issued an extensive memorandum opinion and order in the action commenced by MCI. *See* MCI Communications Corp. v. A. T. & T., 369 F.Supp. 1004 (E.D.Pa. 1973). Inasmuch as 47 U.S.C. § 406 (n.8, *supra*) is basically a mandamus statute, the district court was called upon to determine whether the FCC's prior orders had established a clear duty in A T & T to provide FX, CCSA and other related services. 369 F.Supp. at 1025. The court found that such a duty had been imposed and accordingly issued a preliminary injunction ordering A T & T to provide MCI with the subservices at issue. On appeal, however, this Court vacated the injunction.[9] The effect of our decision was to return to the FCC the responsibility for clarifying A T & T's duties to the specialized common carriers.

The FCC made its determination on April 23, 1974 in the decision and order now before us. (Docket No. 19896)[10] 46 F.C.C.2d 413. Reviewing the complete history as outlined

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[9] MCI Communications Corp. v. American Telephone & Telegraph Co., 496 F.2d 214 (3d Cir., 1974).

[10] Throughout the remainder of this opinion, we shall refer to the Commission's April 23rd decision as Docket 19896.

Intervening in the Commission's proceeding were MCI, American Satellite Corporation, Data Transmission Company, The Western Union Telegraph Company, N-Triple-C, Inc., Southern Pacific Communications Company, CML Satellite Corporation, Western Tele-Communications, Inc., CPI Microwave, Inc., The Chesapeake and Potomac Telephone Company, RCA, Global Communications, Inc. and the United States Independent Telephone Association.

above, the Commission made a dual announcement. First it concluded that it had, in its prior actions, required A T & T to provide FX and CCSA services to MCI and other specialized common carriers on a nondiscriminatory basis (and under appropriate financial arrangements). Then, recognizing that its prior orders may not have been clear, the Commission reviewed the entire question of interconnection anew and concluded again that A T & T is required to provide such services on a non-discriminatory basis. In short, the FCC found:

> . . . that our prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide, and that Bell has been directed to furnish interconnection facilities for the purpose of enabling MCI and the other specialized carriers to provide all such services, including FX and CCSA type services. However, we recognize that our prior orders may not have been perfectly clear. In this proceeding, therefore, we are again reviewing the question of interconnection. We have given careful consideration to the arguments advanced by Bell in its briefs and at oral argument but . . . we are of the view that achievement of our objective that competition in the provision of interstate private line communications services be on a full, fair and nondiscriminatory basis requires the issuance of broad interconnection orders. Our orders herein therefore make clear that Bell is to provide interconnection facilities for all of the authorized services of the specialized carriers, including FX and CCSA.

46 F.C.C.2d at 426-427.

On the basis of this conclusion, the Commission issued orders (see Appendix) requiring A T & T to provide FX and CCSA to the specialized carriers on a nondiscriminatory basis.

In petitioning for review, A T & T assails the FX/CCSA orders in three regards. A T & T contends that the interconnection orders are invalid because: (1) the FCC did not conduct an evidentiary hearing, (2) the FCC utilized substantively infirm justifications in support of its orders, and (3) the FCC's mandate is expressed in overbroad terms. We shall evaluate these contentions in order.

B. *Nature of the Proceedings*

We are unable to evaluate A T & T's contentions without first resolving a question that cuts across many of the issues facing this Court. A T & T asserts that the April 23rd orders (see Appendix) represent the first time in which the Commission, as a whole, required A T & T to provide FX and CCSA to the specialized carriers. A T & T views the prior (1971) proceeding—*Specialized Common Carrier Services* (Docket 18920)[11]—as requiring no more than the furnishing of "local loops" (i.e., the interconnection of specialized carrier terminals with customer systems). *See* Petitioner's Brief at 35. Accordingly, in lodging its procedural and substantive attacks upon the April 23rd FX and CCSA orders, petitioner characterizes Docket 19896 as an independent proceeding. The Commission and several of the intervenors view Docket 19896 differently. According to the Commission, A T & T's responsibility to supply FX and CCSA was fixed by the *Specialized Common Carrier Services* decision (Docket 18920-1971). Respondent argues that the second proceeding (Docket 19896-1974) and the resultant orders merely represent the Commission's method of enforcing a previously announced mandate.

At first glance, A T & T's characterization of the proceedings appears to have merit. There is no mention of FX or CCSA in the *Specialized Common Carrier Services* decision. Instead, the Commission speaks only generally of

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[11] We shall, at times, refer to the *Specialized Common Carrier Services* decision as Docket 18920.

"private line services," without reference to the components of such service. Nevertheless, upon closer examination, we are convinced that the Commission's decision in Docket 18920 includes a direction to the established carriers to provide FX and CCSA to the specialized carriers on a non-discriminatory basis. We base this conclusion upon a number of factors.

First, we reject the suggestion that Docket 18920 dealt only with "local looping." [12] In framing the issues for consideration, the Notice of Proposed Rule-Making identifies as separate matters the following issues:

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and if so:
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> . . . . . .
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> E. What is the appropriate means for local distribution of the proposed services?

24 F.C.C.2d at 327 (1970). In short, before reaching the issue of local distribution (issue "E"), the Commission proposed to consider a more general topic: entry of new carriers into the private line service field.

Second, we note that in assessing the extent to which the established carriers' revenues might be diverted by competition from the specialized carriers, the FCC focused upon the *total* revenues earned by the established carriers in private line services.[13] We find this focus to be significant.

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[12] In support of its assertion that *Specialized Common Carrier Services* dealt only with "local looping," AT&T notes that the FCC has similarly characterized the 1971 proceedings in a brief submitted to the Ninth Circuit. At oral argument herein, the Commission stated that any such representation was unintentional, and we so regard it.

[13] In Docket 18920, the FCC stated:

> 78. AT&T claims that the diversion of revenues from new entry would not be insubstantial and might prejudice tele-

Implicit in the FCC's evaluation is the assumption that the new entrants will provide services similar to those pro-

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phone users by delaying the installation of large capacity facilities (e.g., L5 coaxial cable carrier systems) on high density routes—thereby jeopardizing the realization of declining unit costs which would benefit all classes of AT&T's customers. AT&T claims that competing carriers would simply be engaged in "cream-skimming" and thus cause AT&T to depart from nationwide cost-averaging and the maintenance of nationwide uniform interstate rates. Like the staff, we do not see how there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihood that AT&T would obtain a very substantial share of the potential market for specialized services.

79. AT&T's reports to us indicate that the Bell System had gross operating revenues of approximately $16.9 billion in 1970, as compared to about $15.7 billion in 1969 (not including income from other sources such as Western Electric). Most of these revenues were derived from intrastate and interstate services which the applicants do not seek to provide. Interstate revenues constitute about 30 percent of AT&T's total revenues, and about 87 percent of the interstate revenue is derived from message toll telephone (MTT) and wide area telephone services (WATS). Interstate private line revenues (including revenue from program transmission—a service not proposed by the applicants) amount to about 4% of total Bell System revenues. While there is some data usage of the switched network, it has been estimated that such usage (measured in terminal hours) accounted for less than 1% of total usage (intrastate and interstate) in 1968 (1 SRI Report 7379B, p. 51), and about 1.7% in 1969 (paragraph 34 above).

80. Projecting present growth rates, AT&T has estimated that the existing plant of the Bell System would quadruple by 1980. As indicated in paragraph 63 above, this projection is based primarily upon the rapidly expanding growth in the use of standard voice communications services. Revenues from interstate MTT and WATS had an annual growth rate of about 12 percent from 1965 to 1969. During the same period the growth rate for interstate private line services was about 15

vided by the established carriers within the rubric of "private line services." As A T & T conceded in oral argument

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percent, and AT&T estimates that revenue from such services would amount to $2.7 billion by 1980. This figure would still constitute a relatively small percentage of total interstate revenues when compared to the compounded effect of a 12 percent annual growth in interstate MTT and WATS revenues. In this proceeding AT&T stated that the growth rate in the volume of data transmission over the past five years has been in the range of 50 percent annually (AT&T reply comments, page 35), and in the Computer Inquiry it estimated that data usage would amount to 5-10 percent of peak network load by 1980. Though AT&T does not indicate what proportion of this data growth and projected usage is interstate, the percentage of data usage by 1980 would be a comparatively small percentage of total usage even assuming that it were all interstate.

81. While AT&T does not challenge the revenue figures used by the staff or those used by MCI, it claims that the staff erred in assuming that private line does not represent a significant portion of the use of existing or future systems. It may be, as alleged by AT&T, that private line service accounts for about 25 percent of AT&T's total interstate channel miles. However, the point raised in the staff's analysis is that the portion of AT&T's total business which might be jeopardized, i.e., the interstate private line business, represented only a very small fraction of Bell's total revenues. In terms of the total investment of the Bell System, the investment in all interstate circuitry is of much less significance than the 25 percent of interstate channel miles noted by AT&T as being devoted to the private line services. Moreover, the total private line circuit mileage usage includes television program transmission which is a relatively voracious consumer of interstate channel mileage. For example, from 600-1200 voice circuits can be derived from the bandwidth required for a single video channel (depending on the age and type of equipment utilized). We might also note that with the rapid growth in demand for circuitry for services other than private line, the rapid growth anticipated for the specialized services and the time frame which will be required for implementation of the plans of potential competitors, we cannot visualize AT&T being burdened with unusable quantities of circuitry for any significant period of time.

before this Court, it has traditionally provided FX and CCSA within its private line services.[14] It follows *a fortiori* that if the Commission contemplated the diversion of revenue attributable to A T & T's FX and CCSA services, the Commission must have assumed that FX and CCSA would be within the services provided by the specialized common carriers. *See* n.16, *infra*.

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82. Most significantly, we see no reason whatsoever to assume that the applicants would divert all or even a substantial portion of that comparatively small percentage of existing and projected Bell System business that is vulnerable to competition. As previously stated, the competition is for evolving, new, diverse and specialized needs in a dynamic, rapidly growing market. The applicants are seeking in large part to exploit latent demands and may well expand the size of the total communications market. Moreover, they are proposing very small scale operations compared to those of AT&T. MCI anticipates only about $55 million in total annual revenues from all of the MCI systems covered by applications on file at the time of its comments (Appendix C, page 3). Datran's proposed plant investment is only about $350 million, compared to AT&T's 1970 plant investment of approximately $54.8 billion and its investment programs of $7.7 and $8.2 billion for 1971 and 1972. Datran has indicated that it hopes to obtain about 10 percent of the data market by 1980. In addition, the introduction of new services and facilities by the specialized carriers would take place gradually over a period of time, with the volume paralleling the market growth in demand for specialized services. And, finally, AT&T is adapting to supply certain specialized services which have not been adequately provided in the past (e.g., its proposed digital data network), and is free to compete with the specialized carriers for the potential market. AT&T has vast competitive resources, and it is likely that it will succeed in obtaining a very substantial portion of the large potential market. (footnotes omitted)

[14] *Cf.* MCI Communications Corp. v. American Telephone & Telegraph Co., *supra*, 369 F.Supp. at 1013 ("Bell includes FX and CCSA in the category of private line service in their tariffs and in all of their private line sales literature, manuals, and the like.").

Third, in the same vein, we note the Commission's instruction that:

> "we do contemplate full and fair competition in the specialized field among all carriers, both established and new . . . ."

29 F.C.C.2d at 916 (1971). Given this objective of *full* competition, it is difficult to understand why the Commission would authorize the new carriers to offer an incomplete "package" of private lines services. In the absence of any suggestion to the contrary, we read the "full competition" mandate as an indication that the Commission intended to authorize the new carriers to provide all elements of private line services theretofore furnished by the established carriers.

Finally, we are persuaded by the broad language utilized by the Commission in Docket 18920 (1971). Aside from its repeated use of the generic phrase "private line service," the FCC stated (in its conclusion with regard to issue "E"):

> We reaffirm the view expressed in the Notice (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." In view of the representations of A T & T and G T & E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential

> new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision.

29 F.C.C.2d at 940 (1971). We read this statement as extending beyond "local loops," incorporating a general direction to the established carriers to enable the new entrants to provide the variety of private line services furnished in the past by the established carriers.

A T & T contends that the FCC's decisions in Dockets 18920 and 19896, as well as this Court's recent opinion in MCI Communications Corp. v. A. T. & T., *supra,* belie the assertion that FX and CCSA were contemplated by the *Specialized Common Carrier Services* decision. First, A T & T aserts that in Docket 18920, the Commission assumed that it was encouraging the development of new types of services. Inasmuch as FX and CCSA were already provided by A T & T and by independent carriers, A T & T suggests that the Commission was contemplating other, more unique services, in Docket 18920. While there is language in Docket 18920 indicating a concern with new, customized services, we interpret this language as referring not only to the types of services provided, but also to the delivery of private line services to ultimate customers who theretofore had been unable to obtain private line services fashioned to their particular needs.[15] Second, A T & T

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[15] We note that in characterizing MCI's application, the Commission stated in its Notice of Proposed Rule-Making:

> According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability.' For example, the customer may

asserts that in Docket 19896, the Commission conceded that it had not ordered the provision of FX and CCSA in its 1971 rulemaking proceeding. As discussed above (*see* p. 1259, *supra*), the Commission did admit in Docket 19896 that the scope of its prior orders may not have been "perfectly clear" with regard to FX and CCSA. We treat this admission as the product of the agency's conservative approach in Docket 19896, in no way undermining the Commission's holding that Docket 18920 contemplated the provision of FX and CCSA.[16] Third, petitioner contends that

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purchase the exact bandwidth required on a point-to-point basis (including one-way channels), utilize it in whatever transmission mode he chooses (voice or date, alternately or singly), mix different bandwidths on the same channel, use his own terminal equipment and install his own equipment on MCI towers and shelters, provide either analog or digital input signals, and avail himself of MCI's offering of channels designed especially for data use with rates based on transmission speed rather than bandwidth.

24 F.C.C.2d at 323.

[16] In its "enforcement" proceeding (Docket 19896), the Commission explained unequivocally that it had intended to include FX and CCSA within its Docket 18920 "rule." The FCC stated that:

> The Specialized Common Carrier Services proceeding involved rulemaking for the determination of basic policies with respect to the provision of private line services by the specialized carriers. While FX and CCSA are not specifically mentioned in the Specialized Common Carrier Services decision, this is because we were concerned with private line services generally and did not specifically focus on interconnection for FX and CCSA services or any others. It should be noted that the Commission considered the possibility of the "total diversion" of Bell's private line revenues, although the possibility was deemed to be remote. We would not have discussed this remote possibility of a "total diversion" of Bell's private line services if the competition offered by the specialized carriers were not to include FX and CCSA services, which account for a substantial share of Bell's total private line revenues. These

our vacation of the affirmative injunction ordered by the district court in MCI Communications Corp. v. A. T. & T., *supra,* signifies disagreement with the district court's conclusion that Docket 18920 required A T & T to provide FX and CCSA to the specialized carriers. We reject any such reading of our opinion in MCI.[17] Inasmuch as jurisdiction was predicated upon a mandamus statute (47 U.S.C. § 406), at issue in MCI was the question of whether or not A T & T had a *clear and unequivocal* duty to provide FX and CCSA (and other services) as a result of prior FCC orders. Since the issue is technical in nature, and since the Commission had announced that it was considering this precise question in its Docket 19896 proceedings, this Court held that the doctrine of primary jurisdiction precluded it from reaching the merits. *See* MCI Communications Corp. v. A. T. & T., *supra,* 496 F.2d at 223-224. We stated:

> Under the facts of this case, we have concluded that the district court erred in not staying any action by it, at the least after December 13, 1973, until the FCC had had an opportunity to act on its above-mentioned proceeding at Docket No. 19896 where argument was scheduled for and held on March 4, 1974, paricularly because until that proceeding is resolved defendants will not have the 'clear and unequivocal duties' referred to above.

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services come within the terms of our order, and rightly so, because there is no distinction in principle to separate them from other types of interconnection.

46 F.C.C.2d at 424-425.

[17] It should be noted that two of the three members of the panel in the instant case (Judges Weis and Garth) were members of the panel that decided MCI Communications Corp. v. A.T.&T.

496 F.2d at 219-220. Contrary to petitioner's argument herein that this Court has already resolved the FX/CCSA dispute, we decided only that:

> there was sufficient uncertainty concerning the existence and scope of A T & T's obligation to provide interconnections into the switched network . . . that the district court should have deferred to the FCC in determining exactly what private line services had been authorized by the FCC.

496 F.2d at 222.

We thus are unpersuaded by petitioner's arguments with regard to the scope of the proceedings in Docket 18920. We conclude that *Specialized Common Carrier Services* created in A T & T a duty to provide the specialized carriers with FX and CCSA. Accordingly, as to FX and CCSA, we view Docket 19896 (the instant case) as a device for enforcing previously articulated responsibilities, and not as an independent proceeding.

C. *Evidentiary Hearing*

At no time since the FCC's original *MCI* decision (*see* p. 1254, *supra*) has the Commission conducted an adjudicatory hearing with regard to the provision of private line services by the specialized common carriers. In Docket 18920 (*Specialized Common Carrier Services*), the FCC undertook to resolve basic policy issues through "an overall policy and rule-making proceeding." [18] Accordingly, the Commission restricted input to (a) comments on issues raised in the Notice of Proposed Rule-Making, (b) oral argument, and (c) an opportunity to submit written rebuttal. Similarly, in the instant proceeding (Docket 19896), the parties did not enjoy an evidentiary hearing. Rather, they were limited to written comments (briefs) and one day of oral argument.

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[18] 29 F.C.C.2d at 871 (1971).

A T & T contends that the FX and CCSA orders on review herein are invalid in that they had not been preceded by an evidentiary hearing. Petitioner asserts that such a hearing is mandated by Section 201(a) of the Communications Act, 47 U.S.C. § 201(a), which provides that:

> (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Petitioner's argument is actually two-fold: A T & T argues that an evidentiary hearing is required either solely as a matter of statutory construction (in effect, a *per se* rule) or as a result of the issues raised in the pleadings. We disagree.

1. Per Se *Statutory Construction*

We find nothing in the text of § 201(a) to indicate that interconnection orders must be preceded by an evidentiary hearing. The phrase "opportunity for hearing" lacks the reference to a "record" necessary to trigger the evidentiary requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* *See* United States v. Florida East Coast Railway Co., 410 U.S. 224, 234, 93 S.Ct. 810, 35 L.Ed. 2d 223 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972); Duquesne Light Co. v. Environmental Protection Agency, 481 F.2d 1, 6 (3d Cir. 1973). Indeed, the statutory phrase ("opportunity for hearing") is neutral: it no more

requires an evidentiary hearing than does the equivocal phrase "proceeding." As the Supreme Court has recognized:

> The term "hearing" in its legal context undoubtedly has a host of meanings. Its meaning undoubtedly will vary, depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts.

United States v. Florida East Coast Railway Co., 410 U.S. at 239, 93 S.Ct. at 818.

A T & T does not offer legislative history to support its contention that the seemingly ambiguous phrase "opportunity for hearing" mandates an evidentiary hearing. Instead, petitioner relies upon past practices of the Federal Communications Commission. While we recognize that the Commission has previously extolled the utilization of adjudicative hearings in § 201 proceedings,[19] we do not believe that this "prior practice" is as significant as is claimed by A T & T. The Commission's former policy of evaluating interconnection on a case-by-case basis was not predicated upon a belief that § 201(a) required such a policy. Rather, it was developed as a matter of procedural policy, reflecting the Commission's view of the most efficacious and just method of administering interconnection petitions. In the absence of a statutory mandate, we see no reason to bind the Commission to this procedural policy. As technology develops and the field of communications changes, procedural, as well as substantive, policy must be flexible. The mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach. *See* Phillips Petro-

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[19] *See* Western Union Telegraph Co., 17 F.C.C. 152, reconsideration denied, 17 F.C.C. 503 (1952).

leum Co. v. Federal Power Commission, 475 F.2d 842 (10th Cir. 1973), cert. denied, 414 U.S. 1146, 94 S.Ct. 901, 39 L.Ed.2d 102 (1974). *Cf.* Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 947-948 (1965). Accordingly, we do not regard the FCC's prior practice as dispositive of the type of "hearing" required by § 201(a).

We are persuaded instead that § 201(a) should be interpreted to permit procedures less formal and adversarial than the evidentiary hearing demanded by A T & T. Three factors lead us to this conclusion. First, as the Supreme Court has suggested in FCC v. Pottsville Broadcasting Co.[20] and in In re Permian Basin Area Rate Cases,[21] procedural flexibility can aid the FCC in making the substantive determinations that it is required to make under the Communications Act. To lock the FCC into one type of proceeding—be it evidentiary or otherwise—could jeopardize the ability of the Commission to determine the "public interest" in a given case. Second, we view the "*per se*" rule advanced by A T & T as being contrary to legislative command. Congress has empowered the FCC to "conduct its proceeding in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). This direction leaves to the agency the determination of the type of procedure to be employed in a particular case. The *per se* approach suggested by A T & T is at odds with this flexible, discretionary standard. Third, we recognize that several courts have come to favor rule-making over adjudication for the formulation of new policy. *See* National Petroleum Refiners Association v. Federal Trade Commission, 157 U.S.App.D.C. 83, 482 F.2d 672, 681-683 (1973), cert. denied, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974); WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir.), cert. denied, 393 U.S. 914,

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[20] 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940).

[21] 390 U.S. 747, 777, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968).

89 S.Ct. 240, 21 L.Ed.2d 200 (1968); American Airlines, Inc. v. Civil Aeronautics Board, 123 U.S.App.D.C. 310, 359 F.2d 624, 630 (1966) (en banc); Long Island Railroad Co. v. United States, 318 F.Supp. 490, 496 (E.D.N.Y.1970) (three-judge court, per Judge Friendly). While there must be limits to this trend,[22] the rationale employed is logical and persuasive. Non-evidentiary rule-making permits broad participation in the decision-making process and enables an administrative agency to develop integrated plans in important policy areas. *See generally* Davis, Administrative Law Treatise, § 6.15 (1970 Supp.); Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. at 930-942; Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 376 (1974); *see* National Petroleum Refiners Association v. Federal Trade Commission, 482 F.2d at 678-684. Accordingly, we choose not to read into § 201(a) a *per se* evidentiary hearing requirement in the absence of a clear statutory directive to conduct formal adjudicatory hearings.[23] We therefore reject A T & T's contention that § 201(a) requires an evidentiary hearing as a condition precedent to *all* interconnection orders.

2. *Relationship of the Issues to the Form of Hearing*

Alternately, petitioner asserts that the nature of the issues before the Commission demand an evidentiary hearing *in the instant case.* Again, the argument is twofold. A T & T contends that (1) the substantive signifi-

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[22] *See, e.g.*, NLRB v. Bell Aerospace Co., Division of Textron, Inc., 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974).

[23] At least one other Circuit has demonstrated a similar reticence to prohibit the use of nonevidentiary hearings in the absence of a clear Congressional mandate. *See* American Airlines, Inc. v. CAB, 123 U.S.App.D.C. 310, 359 F.2d 624, 629 (1966) (en banc); *cf.* National Air Carrier Association v. CAB, 141 U.S.App.D.C. 31, 436 F.2d 185, 194 (1970).

cance of the policy issues and (2) the existence of genuine disputes with regard to material facts require the Commission to conduct an evidentiary hearing before ordering the established common carrier to provide FX and CCSA services to the specialized common carriers.

In evaluating these contentions, it is important to keep in mind the legal framework. As discussed above, we are dealing with a statute that does not mandate a particular form of proceeding for all cases. Instead, § 201(a), as construed in conjunction with § 154(j) leaves the choice of appropriate procedure to the FCC. In the absence of a *per se* statutory directive, the type of procedure chosen must be related to the kinds of issues involved. *See* Walter Holm & Co. v. Hardin, 145 U.S.App. D.C. 347, 449 F.2d 1009, 1015 (1971). As both petitioner and respondent have recognized, several "rules of thumb" have developed to correlate procedures with particular types of cases. Nevertheless, the ultimate choice of procedure (in the absence of a statutory mandate) is left to the direction of the agency involved, and will be reversed only for an abuse of discretion. *See* NLRB v. Bell Aerospace Co., Division of Textron, Inc., 416 U.S. at 290-295, 94 S.Ct. at 1770-1772, 40 L.Ed.2d 134 (1974); Security & Exchange Commission v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 9 L.Ed. 1995 (1947). Accordingly, we must determine whether the FCC abused its discretion in ordering the provision of FX and CCSA services without first conducting an evidentiary hearing.

A T & T argues that the scope, importance and complexity of the policy issues involved herein require an evidentiary hearing. Courts have, at times, indicated that evidentiary hearings are necessary to resolve issues of great substantive importance. *See, e. g.,* Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 501 (4th Cir. 1973); Marine Space Enclosures, Inc. v. Federal Maritime Commission, 137 U.S. App.D.C. 9, 420 F.2d 577, 585-586, n.22, 589, n.36 (1969); Citizens for Alle-

gan County, Inc. v. Federal Power Commission, 134 U.S. App. D.C. 229, 414 F.2d 1125, 1128-1129 (1969). We decline to follow this line of cases.

When an administrative agency develops a general policy applicable on a prospective basis, courts have found it unnecessary to require evidentiary hearings. *See, e. g.,* United States v. Florida East Coast Railway Co., 410 U.S. 224, 244-246, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973); Duquesne Light Co. v. Environmental Protection Agency, 481 F.2d 1, 7 (3d Cir. 1973); International Harvester Co. v. Ruckelshaus, 155 U.S.App.D.C. 411, 478 F.2d 615, 630 (1973). This reluctance to prescribe evidentiary hearings on matters of general policy is grounded largely in practical considerations. Evidentiary hearings become "totally unmanageable" when parties attempt to cross-examine the large numbers of persons normally interested in the development of policy. *See,* Virgin Islands Hotel Association v. Virgin Islands Water & Power Authority, 476 F.2d 1263, 1268 (3d Cir. 1973). As the Second Circuit has explained:

> Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir.), cert. denied, 393 U.S. 914, 89 S.Ct. 240, 21 L.Ed.2d 200 (1968). *Compare* Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 36 S.Ct. 141, 60 L. Ed. 372 (1915) *with* Londoner v. Denver, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 (1908).

We see no reason to depart from the doctrine articulated in *Duquesne Light Co., Virgin Islands Hotel Association,* and *WBEN* merely because the policy questions at issue are of special importance or complexity. *Accord:* National Air Carrier Association v. Civil Aeronautics Board, 141 U.S.App.D.C. 31, 436 F.2d 185, 194 (1970) ("The fact that these questions are difficult and important, however, does not mean that an evidentiary hearing is an essential prerequisite to their satisfactory resolution."); *cf.* National Petroleum Refiners Association v. Federal Trade Commission, 482 F.2d at 683-684. A T & T has emphasized in the proceedings before this Court that the FCC's order to provide FX and CCSA services to specialized carriers represents a dramatic new development in communications policy. It is precisely in this type of action that the agency *should be given* the greatest degree of latitude in conducting proceedings consonent with the goals of efficient decisionmaking and responsible "public interest" administration. Accordingly, we conclude that the mere significance and complexity of the policy issues before the FCC in Dockets 18920 and 19896 do not render the Commission's rejection of evidentiary hearings an abuse of discretion.[24]

A T & T, does, however, offer a second ground in support of its demand for an evidentiary hearing. Petitioner

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[24] NLRB v. Bell Aerospace Co., Division of Textron, Inc., 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), aff'g in part, rev'g in part, 475 F.2d 485 (2d Cir. 1973), is not to the contrary. In *Bell Aerospace,* the Second Circuit held that the Labor Board erred in conducting adjudicatory (rather than rulemaking) proceedings to develop policy at odds with prior policy positions of the Board. The Supreme Court's reversal does not suggest (as AT&T would have us hold) that rulemaking was inappropriate and that evidentiary hearings were required. Instead, the Court held only that the NLRB had not abused its discretion in opting for an adjudicatory procedure. 416 U.S. at 290-295, 94 S.Ct. 1770-1772. Our holding in this case is entirely consistent with the Supreme Court's affirmation of agency discretion in procedural matters.

asserts that material factual issues exist and require adjudicatory proceedings. The factual issues relate primarily to the difficulties which A T & T anticipates upon interconnecting with the specialized carriers. In particular, A T & T contends that the Commission should have conducted evidentiary hearings to evaluate the established carriers' claims that interconnection (for FX and CCSA services) will: (1) impair the efficient operation of A T & T's switch network, (2) lead to substantial costs to the public, and (3) jeopardize the operation of all telephonic communications in the event of faulty performance in the specialized carriers' lines.

Generally, the existence of material factual issues requires an agency to conduct evidentiary hearings. *See e.g.,* Air Line Pilots Association, International v. C.A.B., 154 U.S. App. D.C. 316, 475 F.2d 900, 904 (1973); Marine Space Enclosures, Inc. v. F.M.C., 137 U.S. App. D.C. 9, 420 F.2d 577, 589, n.36 (1969).[25] There are, however, important exceptions to this general rule. Professor Davis distinguishes between two types of factual disputes: those which can and those which cannot be "decisively resolved" by evidentiary submissions. Davis, Administrative Law Treatise, § 7.06 (1958 ed.). While those which can be decisively resolved ("adjudicative facts") should be subject to evidentiary hearings, those which do not lend themselves to evidentiary resolution ("legislative facts") obviously do not require adjudicatory proceedings. *See* SEC

[25] On the other hand, it is well settled that there is no need for an evidentiary hearing when there is no material factual dispute involved. *See, e.g.,* Denver Union Stock Yard Co. v. Producers Livestock Marketing Association, 356 U.S. 282, 78 S.Ct. 738, 2 L.Ed.2d 771 (1958); Appalachian Power Co. v. E.P.A., 477 F.2d 495, 504 (4th Cir. 1973); Municipal Light Boards v. F.P.C., 446 U.S.App.D.C. 294, 450 F.2d 4311, 4315 (1971), cert. denied, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 445 (1972); Upjohn Co. v. Finch, 422 F.2d 944, 955 (6th Cir. 1970); Citizens for Allegan County, Inc. v. F.P.C., 434 U.S.App.D.C. 229, 414 F.2d 1125, 1128 (1969) (and cases cited at 1128, n. 5).

v. Frank, 388 F.2d 486, 491-492 (2d Cir. 1968); American Airlines, Inc. v. CAB, 123 U.S.App.D.C. 310, 359 F.2d 624, 633, cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966); *cf.* Virgin Islands Hotel Association v. Virgin Islands Water & Power Authority, 476 F.2d 1263, 1268 (3d Cir. 1973).

We do not believe that the factual issues alleged by A T & T require an evidentiary hearing. Indeed, of all the parties to this dispute, A T & T stands in the best position to resolve these issues outside of an adjudicative forum. In submitting tariffs for the provision of FX and CCSA services to the specialized carriers, A T & T may require the specialized carriers to satisfy reasonable conditions for their use of A T & T's switched network. A T & T thus can protect itself against the technical difficulties which it has requested the Commission to evaluate. If the FCC believes that the tariffs ultimately filed result in too high a cost, the Commission has ample authority to suspend and review the tariffs. Given the nature of these issues, we hold that the Commission did not abuse its discretion in denying an adjudicatory "airing" of the claims raised by A T & T.

In reaching this conclusion, we are especially mindful of the ultimate issue before us. We are not overly concerned with drawing a "bright line" between adjudication and rule making.[26] Regardless of the label and the procedure utilized, "the ultimate standard against which we must evaluate the fairness of the proceedings is due process of

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[26] We have previously noted that:

> An attempt to draw a bright line between situations requiring adjudicative hearings and those calling for rule-making is a task often unresponsive to the actual problems presented in a given case. Rather, a growing body of case law and scholarly discussion has indicated that hybrid proceedings, tailored to the types of issues contested, appear to be a salutary alternative to efforts to sketch a rigid demarcation. (footnotes omitted)

Duquesne Light Co. v. E.P.A., 481 F.2d 1, 5-6 (3d Cir. 1973).

law." Hoffman-La Roche, Inc. v. Kleindienst, 478 F.2d 1, 12 (3d Cir. 1973). Upon our review of the record, we are convinced that the procedures utilized by the Commission pass constitutional muster. A T & T was given two separate opportunities (Dockets 18920 and 19896) to dissuade the FCC from ordering FX and CCSA interconnection. In both proceedings A T & T was given notice of the Commission's intentions [27] and was afforded the opportunity to present its arguments against the proposed interconnection. Inasmuch as petitioner can legitimately claim neither surprise nor denial of the opportunity to speak meaningfully to the issues before the Commission, we must reject the contention that A T & T was denied the "opportunity for hearing" required by § 201(a) and by due process of law.[28]

D. *Substantive Validity of the FX and CCSA Orders*

Petitioner contends that the FX and CCSA orders (see Appendix) are substantively invalid. In advancing this contention, A T & T argues first that the Commission was not entitled to rely upon *Specialized Common Carrier Services* (Docket 18920; 1971) to support its FX and CCSA orders. Second, it argues that the Commission has not yet found that FX and CCSA interconnection would be in the public interest. We hold both of these assertions to be without merit.

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[27] The sufficiency of the notice regarding Docket 18920 is discussed at p. 1269, *infra*.

[28] In reaching this conclusion, we also reject A T & T's arguments: (1) that the Commission's focus upon an individual carrier required an evidentiary hearing, and (2) that the FCC did not follow proper rule-making procedures. Both of these arguments are predicated upon the characterization of Docket 19896 as an independent proceeding, a characterization which we have rejected (*see* pp. 1259-1263, *supra*).

1. *Specialized Common Carrier Services* (Docket 18920; 1971)

Viewing Docket 19896 (1974) as an independent proceeding, and characterizing *Specialized Common Carrier Services* (Docket 18980; 1971) as unrelated to FX and CCSA, petitioner argues that the Commission's reliance in Docket 19896 upon the former proceeding invalidates the 1974 FX and CCSA order. We do not agree. Since we have found that *Specialized Common Carrier Services* (Docket 18920; 1971) contemplated the provision of FX and CCSA services,[19] there can be no error in the FCC's relying upon this decision in forcing its previously announced mandate.

As an alternate argument, A T & T argues that even if the Commission did order FX and CCSA interconnection in Docket 18920 (1971), the failure to notify A T & T in advance of the Commission's intention to include FX and CCSA interconnection within the rule-making proceeding precludes subsequent reliance in Docket 19896 upon Docket 18920. The Notice of Proposed Rulemaking in Docket 18920 (24 F.C.C.2d 318) belies this contention. Although the Commission speaks in general terms in the Notice, we conclude that the general references to private line services were sufficient to give A T & T the requisite notice as to FX and CCSA services. In support of this conclusion, we note that the Commission's staff analysis, reproduced in the Notice (in Docket 18920), analyzed "diversion" as follows:

> It is important to recognize that we are concerned with only a relatively small percentage of established common carrier service to the public. For example, A T & T's present interstate business constitutes only about 30 percent of the Bell System's total business; about 87 percent of the interstate revenue is from message toll telephone and wide area telephone service (WATS), and these latter services have an annual

[19] *See* pp. 1259-1263, *supra*.

> growth rate of about 15 percent. None of the applicants proposes to provide this type of service and we see no reason to expect any undesirable effects upon these services. *An examination of A T & T's private line program transmission and other more specialized services indicates that an estimate of the proportion of A T & T services that is vulnerable to competitive inroads would be on the order of 2-4 percent of its existing total business.* (footnotes omitted) (emphasis added).

24 F.C.C.2d at 335. Simple mathematics indicates that this "2-4" percent of [A T & T's] existing total business" represents all interstate revenue earned from sources other than message toll telephone and wide area telphone services. This 2-4 percent must perforce include A T & T's revenue derived from interstate FX and CCSA services. The Commission's analysis, and its reference to these percentages, demonstrates that the Commission was contemplating the provision of FX and CCSA services by the specialized carriers. In further support of our conclusion, we also note that the FCC, in discussing local loop service, spoke expansively of the duty of the established carriers:

> In the MCI case, the Commission retained jurisdiction over the interconnection issue, stating that an order requiring the established carriers to provide loop service would be issued unless it is shown that interconnection is not technically feasible (18 FCC2d at 965; 21 FCC2d at 193). The local exchange facilities of the Bell System and independent telephone companies presently constitute almost the sole means for local distribution of interstate common carrier services (apart from CATV and broadcast facilities). Western Union is almost entirely dependent on the Bell System for its local distribution. If access to local facilities is requested and needed by the applicants, we would expect the local carrier—Bell or other car-

> rier—to permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers. *In other words where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors.* Customers of any new carrier should also be afforded the option by the local carrier to obtain local distribution facilities under reasonable terms set forth in the tariff schedules of the latter. (footnote omitted) (emphasis omitted).

24 F.C.C.2d at 347. If this passage connotes nothing else, it indicates that the Commission intended the established carriers to provide to the specialized carriers the same services (at the same rates) as those provided to A T & T's affiliates. As A T & T had long provided FX and CCSA interconnection to its affiliates, it should have recognized that the Commission would order the furnishings of these services on a nondiscriminatory basis. Accordingly, we reject the alternate contention that A T & T did not receive the requisite notice in Docket 18920 (1971).

We therefore conclude that the Commission was fully justified in relying upon *Specialized Common Carrier Services* (Docket 18920; 1971) in the instant (enforcement) proceeding.

2. *Public Interest Findings*

Section 201(a) of the Communications Act requires (as a condition precedent to the issuance of interconnection orders) that the FCC make a finding that the proposed interconnection will be "necessary or desirable in the public interest." A T & T suggests that the FX and CCSA orders contravene this statutory directive, asserting: (1) that the FCC has never determined that the furnishing of FX and CCSA services to the specialized common carriers

would be in the public interest, (2) that even if such a finding were made, its reliance upon competition contravenes FCC v. RCA Communications, Inc.[30] and Hawaiian Telephone Co. v. FCC,[31] and (3) that even if such a finding were made and was not violative of *RCA* and *Hawaiian Telephone*, the failure of the Commission to indicate its rationale vitiates the required public interest finding.

A T & T's first and third assertions are undermined by *Specialized Common Carrier Services* (Docket 18920). The primary issue considered by the FCC in Docket 18920 was whether as a matter of policy, it was in the public interest to permit "the entry of new carriers in the specialized communications field." 29 F.C.C.2d at 878. As we have previously discussed, the Commission focused upon the *full field* of private line services theretofore provided by the established carriers. The Commission's evaluation demonstrated that the public interest favored the entry of specialized carriers into the full field of private line services. After analyzing its staff's conclusions with regard to the nature of the market, the public's demand for specialized services, the benefits to be expected from new entry, and the likely impact upon the established carriers, the Commission held as follows:

> We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that

[30] 346 U.S. 86, 73 S.Ct. 998, 97 L.Ed. 1470 (1953).

[31] 498 F.2d 771 (D.C.Cir. 1974).

> a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience and necessity.

29 F.C.C.2d at 920. Although the Commission does not mention FX and CCSA by name, we regard the above holding as including an amply-supported finding that the public interest favors the furnishing of FX and CCSA interconnection to the specialized carriers.

A T & T's attempt to invoke FCC v. RCA Communications, Inc., *supra,* is similarly without merit. In *RCA,* the FCC had authorized the opening of new circuits because of "the national policy in favor of competition." 346 U.S. at 89, 73 S.Ct. at 1001. The Supreme Court vacated the agency's order, concluding that the FCC may not authorize new circuits merely in order to foster competition. The Court held that for the FCC to perform its statutory responsibilities, it must at least relate competition to the public interest. In the course of criticizing the Commission for relying solely upon competition, the Court explained that competition could be considered as a "relevant factor in weighing the public interest." 346 U.S. at 94, 73 S.Ct. at 1004. Indeed, Justice Frankfurter explained at great length the extent to which the FCC could consider competition in evaluating the "public interest." He stated:

> We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby [license] authorizations would be granted wherever competition is reasonably feasible. . . . In reaching a conclusion that duplicating authorizations are in the public interest wherever competion is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to

> cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' Far East Conf. v. United States, 342 U.S. 570, 575 [72 S.Ct. 492, 494, 96 L.Ed. 576]. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, *cf.* [National] Labor [Relations] Board v. Seven-Up Co., 344 U.S. 344, 348, [73 S.Ct. 287, 289, 97 L.Ed. 377], but *the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it.* (emphasis added)

346 U.S at 96-97, 73 S.Ct. at 1004. *See also* Hawaiian Telephone Co. v. FCC, (D.D.Cir. 1974).

Specialized Common Carrier Services (Docket 18920) fully comports with the principles articulated in *RCA*. First, the Commission relied upon factors other than competition in making its public interest determination. Specifically, the FCC noted that (1) the specialized communications market is expanding, and that (2) the demand for specialized communications service is growing. 29 F.C.C. 2d at 904-908. Second, following Justice Frankfurter's lead, the Commission concluded and warranted that benefits were reasonably to be anticipated as a result of the entry of new specialized carriers into the market. Quoting from the Notice of Proposed Rule-Making, the FCC identified the following benefits:

> (1) By permitting the entry of specialized carriers, we would provide users with flexibility and a wider range of choices as to how they may best satisfy their expanding and changing requirements for specialized communication service (Notice, paragraph 30).

(2) There is also a question as to whether the existing carriers can meet the requirements in the specialized markets promptly, efficiently and effectively without prejudice to full and timely satisfaction of the increasing requirements of the public monopoly services. The responsibility for meeting the nation's growing and changing communications requirements is now largely concentrated in the Bell System. This responsibility is becoming more and more difficult to discharge in a manner which enables the Bell System to satisfy timely and effectively all existing and anticipated communications requirements. This is partly because of the diversity of such requirements, the obvious problems of designing and engineering facilities capable of meeting all such requirements with equal efficiency, economy and expedition, and the huge and increasing amounts of new capital the Bell System must raise for construction purposes. The entry of new carriers would have the effect of dispersing somewhat the burdens, risks and initiatives involved in supplying the rapidly growing markets for new and specialized services among a multiplicity of entrepreneurs who appear ready, willing and able to assume these undertakings. It would also expand the capability of the communications industry to respond to the challenge of meeting the rapidly growing and varied demands of communications users (Notice, paragraph 32).

(3) Further, while economies of scale may result when large general purpose transmission facilities can be used to meet relatively homogeneous communications requirements, there may be other drawbacks. The sheer size of the A T & T organizational structure, its enormous financing requirements, its vertical integration, and near monopoly position in the provision of communications services may make it slower to perceive and respond to individual, specialized re-

> quir[illegible]nts and to initiate market and technical innovation. [footnote omitted] Competition in the specialized communications field would enlarge the equipment market for manufacturers other than Western Electric, and may stimulate technical innovation and the introduction of new techniques. Moreover, new carriers with smaller scale operations could devote their undivided attention to the particular needs to be served and, lacking a captive market, would be under pressure to innovate to produce those types of services (Notice, paragraph 34).
>
> (4) In an industry of the size and growing complexity of the communications common carrier industry, the entry of new carriers could provide a useful regulatory tool which would assist in achieving the statutory objective of adequate and efficient services at reasonable charges. Competition could afford some standard for comparing the performance of one carrier with another. Moreover, competitive pressure may encourage beneficial changes in A T & T's services and charges in the specialized field, and stimulate counter innovation or the more rapid introduction of new technology (Notice, paragraph 35).

29 F.C.C.2d at 909-910. We regard the listing of factors (independent of competition) and the identification of benefits (reasonably expected) as proof that the FCC viewed competition as a means, rather than as a goal in and of itself, in Docket 18920. Accordingly, we reject petitioner's *RCA* contention and hold that the FCC has made the requisite "public interest" findings.

E. *Overbreadth*

It is undisputed that the FCC has the responsibility to articulate its orders in clear and precise terms, avoiding reasonable doubts as to their ultimate meaning. *See* FTC v. Broch & Co., 368 U.S. 360, 367-368, 82 S.Ct. 431, 7 L.Ed.

2d 353 (1962); FTC v. Cement Institute, 333 U.S. 683, 726, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). A T & T contends that the Commission has not fulfilled this responsibility in the instant case.[31a] Specifically, A T & T asserts that in requiring it to permit any physical connections "essential" to the rendition of "all" private lines services which any of the specialized carriers "presently or hereafter" are authorized to offer (*see* Appendix, ¶ 53a), the Commission has imposed an *unbounded* interconnection order. A similar objection is lodged against the agency's order to cease and desist from engaging in "any conduct" which will re-

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[31a] The United States Independent Telephone Association (USITA), an intervenor, advances its own separate overbreadth argument. In Docket 19896, the Commission stated:

> The show cause order in this proceeding was directed only to American Telephone and Telegraph Company and to the Bell System operating companies. Consequently, cease and desist orders are appropriate only against such companies and will not be issued against any non-Bell companies. However, we wish to place all telephone companies on notice that our policy declarations with respect to interconnection apply to them as well as to the Bell companies. We also emphasize that we expect compliance by all telephone companies with such policy declarations and the orders issued pursuant thereto in the absence of a substantial showing that a particular request for interconnection would result in damage to the telephone system or is otherwise inconsistent with the public interest. Should such compliance not be forthcoming, the offending company will be made the subject of a show cause proceeding or other appropriate remedial action will be taken expeditiously.

46 F.C.C.2d at 437. USITA claims that since the Docket 19896 proceedings involved only interconnection between AT&T and the specialized carriers, the extension to specialized carrier-independent carrier interconnection is unfounded. We disagree. The above quoted paragraph primarily reminds the independent carriers that they are subject to the policies announced in Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971). Any objections that the independent carriers have with specific matters of interconnection may be raised before the FCC in separate proceedings and accordingly, are not before this Court at the present time.

sult in a delay or denial of services "presently or hereafter" authorized (*see* Appendix, ¶ 54a).

Were we to read the Commission's order in a vacuum, we would be inclined to agree with petitioner that the order is somewhat vague and, to a certain extent, overbroad. On its face, the order gives little guidance as to the types of services that A T & T will be required to provide "hereafter."

Nevertheless, we find it unnecessary to remand on this ground. Orders are not to be read in a vacuum, but rather must be read and interpreted in the context in which they appear. *See* FTC v. Cement Institute, 333 U.S. at 729, 68 S.Ct. 793. Viewed in its entirety, the FCC's opinion in Docket 19896 operates to preclude A T & T from treating its Long Lines Department and its affiliates differently than it treats the specialized common carriers. The Commission noted that in previous proceedings, "our action was taken to insure that competition in the provision of interstate private line communications would be on a full, fair, and non-discriminatory basis. . . ." 46 F.C.C.2d at 426. Similarly, the FCC identified as its primary objective in Docket 19896 a communications market in which private line services are provided on a "full, fair, and non-discriminatory basis." 46 F.C.C.2d at 427. Given this concern with non-discriminatory treatment, the FCC's order takes on a definite meaning. As we read the order, the FCC has required A T & T to provide to the specialized carriers those (interconnection) elements of private line services which A T & T supplies to its affiliates and furnishes to customers through its Long Lines Department. We believe that such an order is authorized by 47 U.S.C. § 201(a) and is supported by the Commission's opinion in Docket 19896.

Accordingly, we reject A T & T's contention that the order herein is impermissibly sweeping, undefined and unsupported.

II. *Western Union Contracts*

A. *Background*

At least since 1928, Western Union has leased local distribution facilities from A T & T pursuant to privately negotiated "exchange of facilities" contracts.[32] These contracts are indefinite in term, but provide that either party may terminate upon five years' notice. In September of 1973, A T & T gave notice of its intention to terminate the contracts. Rather than honor such contracts until 1978, however, A T & T attempted to rescind the contracts at once by filing what it hoped would be superseding tariffs.[33] At first, A T & T filed these tariffs with various state regulatory commissions, but, upon FCC order, A T & T also filed the tariffs with the FCC, albeit under protest.

On November 1, 1973, Western Union complained to the FCC, charging that A T & T's tariff practices were unlawful and incapable of superseding the privately negotiated contracts between A T & T and the complainant. The FCC responded to this complaint in its December 13th memorandum opinion and order to show cause.[34] Bell System Tariff Offerings, 44 F.C.C.2d 245 (1973), modified, 44 F.C.C.2d 912 (1974) (Docket 19896). In its December 13th opinion, the Commission, after noting that the tariffs and contracts might not be mutually elusive, ordered A T & T to abide by the contract rates pending the Commission's decision as to whether the contracts could lawfully be su-

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[32] The phrase "exchange of facilities" is apparently a misnomer. AT&T does not receive equipment in return for its facilities, but instead receives monetary compensation. Thus, the contracts at issue more resemble leases than actual "exchange of facilities" contracts.

[33] In a letter dated September 28, 1973, AT&T announced to Western Union its intention to file tariffs to cover services normally provided for under the "exchange of facilities" contracts.

[34] *See* pp. 1257-1258 *supra*.

perseded by a subsequent tariff filing. Furthermore, A T & T was ordered to show cause why it should not cease and desist from:

> (a) altering, in any way, the provisions of exchange facilities contracts with Western Union, except in strict accordance with the terms of such contracts. . . .

44 F.C.C.2d at 251.

A T & T's responses were insufficient to convince the Commission. Relying upon Supreme Court decisions construing the National Gas Act and the Federal Power Act, the FCC concluded (in its opinion released on April 23, 1974) that "Bell cannot supersede, modify, or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action." 46 F.C.C.2d at 432. The Commission therefore rejected the A T & T tariffs to the extent that the tariffs applied to interconnection facilities and services covered by the privately negotiated contracts.[35] A T & T petitions for review.

B. *The Conflicting Precedents*

Both before the Commission and before this Court, petitioner and Western Union (as an intervenor) have relied upon seemingly inconsistent case law. A T & T placed pri-

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[35] The Commission did note that the contracts presented certain difficulties. Western Union complained that the tariff rates far exceeded the contract rates. If, as Western Union alleges, the tariff rates are unreasonably high, this means that all other carriers (who would be bound by the tariffs) are paying excessive rates. If, on the other hand, the differential between the contract and tariff rates is justifiable, this can only mean that Western Union's low rates confer upon it an unlawful preference. The FCC therefore announced in its April 24th decision that it would institute separate proceedings "to determine whether the contract or tariff rates are unreasonably high, unreasonably low, or otherwise discriminatory."

mary reliance upon Armour Packing Co. v. United States [36] to demonstrate that its tariffs may lawfully supersede previously negotiated contracts. Western Union, in response, cites United Gas Co. v. Mobile Gas Corp.[37] and Federal Power Commission v. Sierra Pacific Power Co.,[38] to support the FCC's rejection of the tariffs.

In *Armour*, the question arose as to whether a tariff could supersede a contract entered into between a railroad and a shipper (i. e., a customer). The Court found that the tariff applied, noting that the purpose of the law (i.e., the Interstate Commerce Act) "is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate [be] equally known by and available to every shipper." 209 U.S. at 80, 28 S.Ct. at 435.

A contrary result was reached by the Supreme Court in United Gas Co. v. Mobile Gas Corp., *supra*. Construing the Natural Gas Act,[39] the Court held that a gas company could not unilaterally alter a contract with a distributing company by filing a new tariff with the Federal Power Commission. The Court's holding was premised upon the principle that unilateral modification would be permissible only if authorized by the contract in question or by the Natural Gas Act. After finding that the contract was silent on this issue, the Court analyzed the structure of the Gas Act. Recognizing that the Gas Act requires gas companies to file all contracts with the FPC and authorizes the FPC to modify unreasonable contracts, the Court construed the Act to permit ". . . the relations between the parties to be established initially by contract, the protection of the

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[36] 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681 (1908).

[37] 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956).

[38] 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956).

[39] 15 U.S.C. § 717 *et seq.*

public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." 350 U.S. at 339, 76 S.Ct. at 378. Given this scheme, the Court concluded that "there is nothing in the structure or purpose of the Act from which we can infer the right, not otherwise possessed and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts." 350 U.S. at 343-344, 76 S.Ct. at 380. The Court reached a similar result with regard to the Federal Power Act [40] in FPC v. Sierra Pacific Power Co., *supra.*

While *Armour* and *Mobile* appear at first blush to be wholly inconsistent, they are distinguishable. In *Armour,* the Court emphasized the fact that the Interstate Commerce Act prescribes uniform rates for shippers [41] and therefore cannot permit rates to be set haphazardly by contract. The regulatory statutes confronting the Court in *Mobile* and *Sierra Pacific* are different: uniform rates are not prescribed. Unlike the Interstate Commerce Act, the Natural Gas Act and the Federal Power Act permit rates to be set by contract. Justice Harlan, writing for a unanimous Court in *Mobile,* recognized this very distinction. He wrote:

> The prior decisions of this Court cited by petitioners as requiring an opposite result are readily distinguishable. In Armour Packing Co. v. United States, 209 U.S. 56 [28 S.Ct. 428, 52 L.Ed. 681], a rate contract between a railroad and a shipper at the filed

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[40] 16 U.S.C. § 791a *et seq.*

[41] The Court noted that (under the Commerce Act):

> One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute.

209 U.S. at 81, 28 S.C 435.

> rates in effect at the time the contract was made was held not to justify payment at the contract rate for shipments made after the filed rates for shipments of that character had been increased by the railroad. The very basis for that decision, however, was the requirement of the Interstate Commerce Act that rates to all shippers be uniform and comply with the single tariff filed with the Commission, there being no provision under that Act for the filing of individual contracts. That is, the Interstate Commerce Act by its own force precluded contracts for rates different from those applicable to other shippers. The Natural Gas Act, on the other hand, recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. No contention is made here that the fact that the Mobile contract was at a rate different from that to other customers in itself made the contract illegal or that—as held in Armour—United could not lawfully have complied with the contract had it wanted to.

350 U.S. at 345, 76 S.Ct. at 381. The problem raised by the instant case thus lies not in reconciling *Armour* and *Mobile*, but rather in determining which precedent should stand as a model to resolve the controversy between Western Union and A T & T.

C. *The Instant Case*

In urging this Court to adopt *Armour*, A T & T emphasizes the fact that the Communications Act was patterned upon the Interstate Commerce Act.[42] Without questioning this legislative history, we nevertheless are compelled to find that the instant case and *Armour* are distinguishable. As discussed above, the holding in *Armour* that a tariff could supersede a contract was predicated upon the

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[42] *See* S.Rep.No.781, Committee on Interstate Commerce, 73d Cong., 2d Sess. at 2 (1934).

fact that the Interstate Commerce Act does not envision that shippers' rates will be set by contract. While communications carriers may similarly be prohibited from contracting with customer-users, we find no such directive barring contractual relations between independent carriers.

Indeed, our analysis of the Communications Act leads us to the conclusion that the A T & T—Western Union contracts (unlike the carrier-shipper contract in *Armour*) represent a legitimate method of ordering business relations under Congress' regulatory legislation. Section 203(c) of the Act provides that:

> No carrier, *unless otherwise provided by or under authority of this chapter*, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule. (emphasis added)

47 U.S.C. § 203(c). The caveat in the above provision is critical; carriers must operate by tariff *unless otherwise authorized by the Act*. Such authorization is clearly found in Section 201(b) of the Act, which provides in part, that:

> . . . [N]othing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or

> operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest . . . .

47 U.S.C. § 201(b). In the instant case, § 201(b) is of course not dispositive, since both A T & T and Western Union are carriers "subject to this chapter." Nevertheless, when viewed with still another provision of the Act, § 201(b) takes on some importance. Section 211(a) of the Communications Act provides that:

> Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

47 U.S.C. § 211(a). While § 201(b) speaks only of contracts between a regulated and a non-regulated carrier, section 211(a) goes beyond that limited class. Section 211(a) requires the filing of *two* classes of contracts: contracts between two or more (regulated) carriers *and* contracts involving a regulated carrier and a non-regulated carrier. We read § 211(a) as providing another exception to the general rule of § 203(b): carriers regulated by the Act may order their business relations by contract as well as by tariff.

A T & T concedes that § 211(a) does allow some private-ordering-by-contract as between carriers regulated by the Act. (Petitioner's Brief at 54). However, A T & T contends that its leasing contracts are not of the type described in § 211(a).[48] In support, A T & T points to a Regu-

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[48] AT&T emphasizes the fact that it has not filed the original copy of its Western Union contracts with the FCC, but rather has merely filed a photo-copy of same. We fail to appreciate any real significance in this assertion.

lation identifying types of contracts contemplated by § 201 (a) and argues that a leasing contract is not included. This Regulation provides:

> (a) Each communication common carrier shall file with the Commission, within thirty (30) days of execution (or within 30 days of a carrier first becoming subject to the provisions of this section), a copy of each contract, agreement, concession, license, authorization, or other arrangement to which it is a party with respect to communication traffic affected by the Communications Act of 1934, as amended, relating to the following:
>
> (1) The exchange of services between such carrier and any carrier not subject to the act;
>
> (2) Except as provided in paragraph (e) of this section, the interchange or routing of traffic and matters concerning rates, division of tolls, or the basis of settlement of traffic balances; or
>
> (3) Rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations.
>
> (b) Except as provided in paragraph (e) of this section, a copy of each modification, amendment, or cancellation of any instrument required to be filed under the provision of paragraph (a) of this section shall likewise be filed within thirty (30) days after execution.
>
> (c) Except as provided in paragraph (e) of this section, if any contract, agreement, concession, license, authorization, or other arrangement, or change therein, as contemplated in paragraphs (a) and (b) of this section, is made other than in writing a certified state-

ment covering all details thereof shall be filed within thirty (30) days from the date it is made.

(d) Except as provided in paragraph (e) of this section, upon the filing of any item required by paragraphs (a) to (c) of this section by one or two or more carriers subject to these provisions, each other party to the agreement may, in lieu of also filing a copy thereof, file a certified statement appropriately identifying the document and concurring in the contents thereof, as filed.

(e) With respect to contracts coming within the scope of paragraph (a)(2) of this section between subject telephone carriers and connecting carriers, except for those which relate to communications with foreign or overseas points, such contracts shall not be filed with the Commission; but each subject telephone carrier shall maintain a copy of such contracts to which it is a party in appropriate files at a central location upon its premises, copies of which contracts shall be readily accessible to Commission staff and members of the public upon reasonable request therefor; and upon request by the Commission, a subject telephone carrier shall promptly forward individual contracts to the Commission.

47 C.F.R. § 43.51.

We are unpersuaded by A T & T's argument. Contrary to petitioner's position, it may well be that the Western Union contracts fit within 47 C.F.R. § 43.51(a)(2), since the contracts do establish rental rates. Of more importance, there is nothing in the above Regulation indicating that it contains an exclusive list of all the various types of contracts contemplated by § 211(a). The statute itself suggests no such limited interpretation; section 211(a) is written in terms of "all" contracts. The legislative history, too, indicates that Congress intended *all* intercarrier con-

tracts to be filed with the Commission. In explaining the various sections of the Communications Act, a House Committee wrote:

> Section 211(a) requires filing of all contracts between carriers engaged in the communications business and between communications companies and other common carriers not covered by this bill.

H.R. No.1850, 73d Cong., 2d Sess. at 6 (1934). We conclude that section 211(a) requires the filing of contracts such as the A T & T—Western Union contracts at issue. It follows from this conclusion that the Act permits A T & T and Western Union to provide for the leasing of facilities by contract, as well as by tariff.[44] *See* United Gas Co. v. Mobile Gas Corp., 350 U.S. at 338, 76 S.Ct. at 378 ("by requiring contracts to be filed with the Commission, the [Natural Gas] Act expressly recognizes that rates to particular customers may be set by individual contracts."). *Armour* is therefore distinguishable.

Mobile, too, is distinguishable. In reaching its conclusion that the Natural Gas Act did not authorize the unilateral supersession of contracts by tariffs, the Supreme Court emphasized the fact that the Natural Gas Act empowers the FPC to *regulate* privately-negotiated contracts.[45] The

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[44] We note that the history of business relations between AT&T and Western Union indicate that the two companies have, since 1928, assumed that it is proper to govern their "exchange of facilities" by contract.

[45] Section 5(a) of the Natural Gas Act provides:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is

Court justified the Natural Gas Act's reliance upon individualized contracts in terms of this power, stating that "the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public." 350 U.S. at 339, 76 S.Ct. at 378. Similarly, the Court noted:

> Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. . . . On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

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unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

15 U.S.C. § 717d(a).

350 U.S. at 344, 76 S.Ct. at 380. A similar justification is not available under the Communications Act. Unlike the Natural Gas Act, there is no provision in the Communications Act *expressly* authorizing the Commission to regulate (i. e. supervise in the public interest) privately negotiated contracts.

In Docket 19896, after conceding that the Act does not expressly grant the Commission contract-regulating powers, the FCC concluded that *implicit* in several sections of the Act is the recognition of such a power. Petitioner strongly contests this point, arguing that if the Commission were so empowered, the FCC would not have attempted (as it did in 1964) to persuade Congress to vest authority in it to regulate intercarrier contracts. *See* Hearings on H.R. 10270 before the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 88th Cong., 2d Sess. at 9-10, 24, 39 (1964); *but cf.* United States v. Southwestern Cable Co., 392 U.S. 157, 169-170, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968). We find it unnecessary to resolve this controversy.

Although *Mobile* is distinguishable, the Supreme Court's analysis therein nevertheless causes us to reject A T & T's argument, even if we assume that the Commission lacks regulatory power over intercarrier contracts. The *Mobile* Court reached its conclusion by the following deductive path:

> a) the Natural Gas Act permits parties to order their business relations by contract (i.e., the contract at issue was lawful);[46]
>
> b) since the *contract* at issue does not authorize its own unilateral modification, supersession of the con-

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[46] 350 U.S. at 338, 76 S.Ct. 373.

tract by a unilaterally imposed tariff can only occur if the *Natural Gas Act* grants such a power;[47] and

c) the provisions of the Natural Gas Act do not grant gas companies the power to unilaterally modify contracts.[48]

We have already determined that the Communications Act permits Western Union and A T & T to arrange leases by contract. There being no suggestion that the A T & T—Western Union contracts authorize unilateral modification, the sole question remaining for this Court, according to the *Mobile* analysis, is whether the Communications Act supplies this authorization.

We have recognized that "a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." Bauers v. Heisel, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), cert. denied, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967); *see also* Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437, 27 S.Ct. 350, 354, 51 L.Ed. 553 (1907) (" . . . a statute will not be construed as taking away a commonlaw right existing at the date of its enactment unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.") The Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the

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[47] The Court states:

Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity. . . .

350 U.S. at 339, 76 S.Ct. at 378.

[48] 350 U.S. at 339-344, 76 S.Ct. 373.

Act "imperatively require" that we imply such authorization. The two sections of the statute coming closest to authorizing a unilateral change—sections 203(b) [49] and 204 [50]—are insufficient, even in their combined effect, to

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[49] 47 U.S.C. § 203(b) provides:

> No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

[50] 47 U.S.C. § 204 provides:

> Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of

convince us that the FCC has the power to authorize the unilateral changes attempted by A T & T. Section 203(b), prohibiting tariff modifications unless ample notice is given to the Commission, *takes away* power from communications carriers. As a negative pronouncement, § 203(b) in no sense dictates circumstances in which a tariff could be used to abrogate a prior contract. In *Mobile,* the Supreme Court explained that a parallel provision of the Natural Gas Act [51] similarly did not constitute an affirmative grant of power. The Court stated:

> It is argued that [Section 4(d)] authorizes a natural gas company to change its rates contracts simply by filing a new schedule of rates, to go into effect in no less than thirty days. On its face, however, § 4(d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a con-

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the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

[51] Section 4(d) of the Natural Gas Act provides:

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717c(d).

> tract. . . . The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made. . . . In short, § 4(d) on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission. To find in that section a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there or reasonably to be implied. (original emphasis)

350 U.S. at 339-340, 76 S.Ct. at 378. Section 204, establishing the procedure for FCC review of newly filed tariffs (and including an authorization for temporary suspensions of tariffs), similarly is silent about the utilization of tariffs to modify existing contracts. We find neither in this section nor in any other provision of the Act an indication that Congress intended to allow carriers to abrogate intercarrier contracts by means of subsequently filed tariffs.

The cases cited by petitioner do not detract from our conclusion that the Communications Act lacks an authorization of unilateral contract modification. Cruces Cable Co., 35 F.C.C.2d 707 (1972), reconsideration denied, 39 F.C.C.2d 552 (1973) is distinguishable. Although in *Cruces* the Commission did indicate that a communication carrier may unilaterally abrogate a contract by filing a tariff, the contract in *Cruces* was wholly unlike the contracts involved herein. In *Cruces,* the contract contained no specific rate, but rather provided that the tariffs "shall be a part of this Agreement as fully as though set forth specifically herein." 35 F.C.C.2d at 708. The subsequently filed tariff was not (as here) inconsistent with the contract, but rather was expressly contemplated by the parties in their agreement, and supplied the missing contract rate. The use of a tariff as an integral part of a contract may not be compared with the use of a tariff to abrogate a con-

tract. *Cf.* United Gas Co. v. Memphis Light, Gas & Water Division, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153 (1958); Richmond Power & Light Co. v. F.P.C., 156 U.S.App.D.C. 315, 481 F.2d 490, 492-493 (1973), cert. denied, 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed.2d 473 (1974). Cincinnati, New Orleans & Texas Pacific Railway Co. v. Chesapeake and Ohio Railway Co., 441 F.2d 483 (4th Cir. 1971), is also distinguishable. At issue in *Cincinnati* was the right of a railroad to recover charges under a tariff that had already become effective. The Court's conclusion that the charges were recoverable (despite the fact that the tariff abrogated a contract) was based on the well-established principle that a "tariff, so long as it is in effect, must be treated as though it has the force of law." 441 F.2d at 488. In the instant case, A T & T's tariff has not yet been put into effect (the Commission having rejected it) and thus cannot claim the support of the principle articulated in *Cincinnati.* Finally, we regard petitioner's reliance upon A T & T v. F.C.C., 487 F.2d 865 (2d Cir. 1973) to be unpersuasive.[52] It was A T & T, and not the FCC, that set

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[52] Section 205(a) of the Communications Act provides, in part, that:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall

the current A T & T—Western Union contract rate. Thus, if any party "froze" the rate, it was A T & T, and not the Commission.

Accordingly, we agree with the Commission's conclusion that the Communications Act does not authorize the modification or abrogation of contracts by subsequently filed tariffs. It follows from this conclusion that the FCC acted properly in rejecting the A T & T tariff (to the extent that the tariff conflicted with the A T & T—Western Union contracts), the Commission having the power to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). *See* United Gas Co. v. Mobile Gas Corp., 350 U.S. at 347, 76 S.Ct. 373 (construing a similar provision of the Natural Gas Act); *cf.* Associated Press v. FCC, 145 U.S.App.D.C. 172, 448 F.2d 1095, 1103 (1971) (dictum).[53]

We conclude that the FCC's FX and CCSA orders (¶ 53 and ¶ 54) and the Commission's partial rejection of the A T & T tariff (¶ 55) are proper. The Commission's decision and order in Docket 19896, 46 F.C.C.2d 413, will be affirmed.

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adopt the classification and shall conform to and observe the regulation or practice so prescribed.

In AT&T v. F.C.C., *supra*, the Second Circuit analogized an order compelling AT&T to continue charging prior tariff rates to a "prescription" order. 487 F.2d at 875 ("Under the circumstances of this case, we see no difference between a 'prescription' of new rates and a 'freeze' of old rates."). Since a prescription order cannot be issued without the FCC first conducting a hearing (*see* § 205(a), *supra*), the Court struck down a "freeze" order for failure to conduct a § 205(a) hearing.

[53] In light of the above conclusion, we find it unnecessary to discuss alternate contentions offered by the FCC in support of its partial rejection of the AT&T tariffs.

APPENDIX

53. Accordingly, It Is Ordered, that American Telephone and Telegraph Company and the Bell System companies enumerated in paragraph 18 of our Memorandum Opinion and Order to Show Cause, 44 F.C.C.2d 245 at 251,[54] comply with the following not later than ten days after the release of this Decision:

(a) Furnish to MCI Telecommunications Corporation, MCI New York West, Inc. and other specialized common carriers the interconnection facilities essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communications services, including interconnection by the specialized carriers into a telephone company's local exchange facilities for the purpose of furnishing Foreign Exchange (FX) service or for insertion into telephone company Common Control Switching Arrangements (CCSA);

(b) Furnish the interconnection facilities specified in subparagraph (a) above on reasonable terms and conditions; and file with the Commission pursuant to

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[54] The companies enumerated are: Bell Telephone Company of Pennsylvania, C & P Telephone Company of Washington, D.C., The C & P Telephone Company of Maryland, The C & P Telephone Company of Virginia, The C & P Telephone Company of West Virginia, Cincinnati Bell, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Mountain States Telephone and Telegraph Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Northwestern Bell Telephone Company, The Ohio Bell Telephone Company, Pacific Northwest Bell Telephone Company, The Pacific Telephone and Telegraph Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, The Southern New England Telephone Company, Southwestern Bell Telephone Company, and Wisconsin Telephone Company.

Section 203 of the Act and Part 61 of the Commission's Rules, tariff schedules to cover interconnection facilities for all of the authorized interstate and foreign communications services of the specialized common carriers;

(c) The specialized common carriers shall be charged for the interconnection facilities and services furnished by American Telephone and Telegraph Company and the Bell System companies, in connection with the transmission by the specialized carriers of authorized interstate and foreign communications and the provision of authorized interstate and foreign communications services, solely and exclusively pursuant to the charges, terms, and conditions specified in tariffs filed with the Commission; and

(d) Furnish to the specialized carriers for their authorized interstate and foreign communications services, interconnection facilities similar to those presently provided to Bell's Long Lines Department on a non-discriminatory basis.

54. It is Further Ordered, pursuant to the authority contained in the provisions of Sections 4(i) and 205(a) of the Communications Act, that American Telephone and Telegraph Company and the Bell System companies shall not later than ten days after the release of this Decision Cease and Desist from:

(a) Engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI and other specialized common carriers for their presently or hereafter authorized interstate and foreign communications services;

(b) Implementing any policy or practice which forecloses the establishment of through routes, and charges, facilities and regulations applicable thereto, in connection with MCI's and other specialized com-

mon carrier parties' presently or hereafter authorized interstate and foreign communications services;

(c) Implementing any policy or practice which results in denying to MCI or any other carrier party reasonable interconnection services similar to those provided to the Long Lines Department of the American Telephone and Telegraph Company in connection with the authorized interstate and foreign communications services of such other carriers; and

(d) Charging MCI or the other specialized common carrier parties for interconnection facilities furnished in connection with the authorized interstate and foreign communications services of the said specialized carriers pursuant to tariffs filed with state regulatory commissions or delaying or refusing to furnish requested interconnection facilities for such purposes pending approval by state regulatory commissions of the furnishing of the aforementioned facilities.

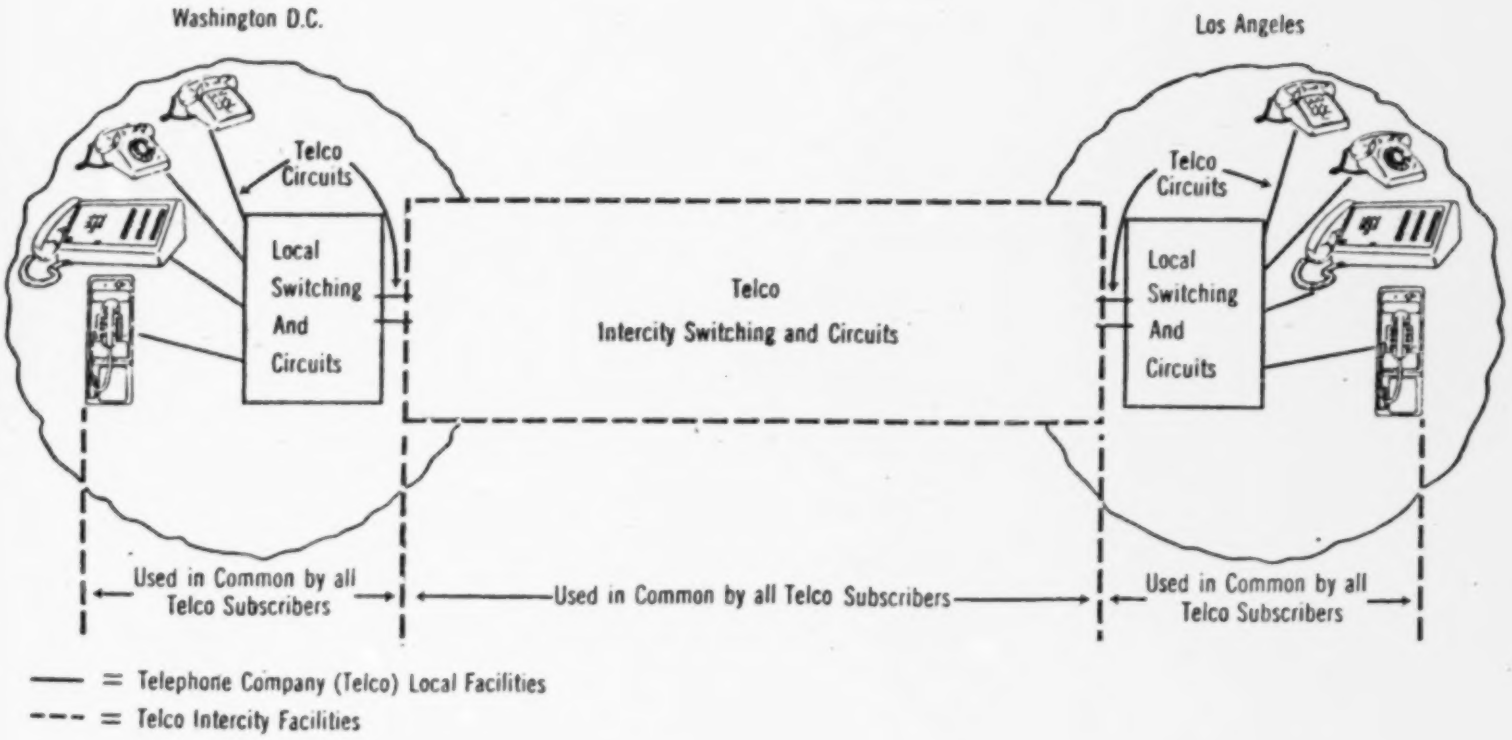
55. It Is Further Ordered that:

(a) Insofar as the tariffs filed by Bell include interconnection facilities and services covered by the Bell-Western Union exchange of facilities contracts and used by Western Union in connection with the provisions of its authorized interstate services, they Are Rejected; and

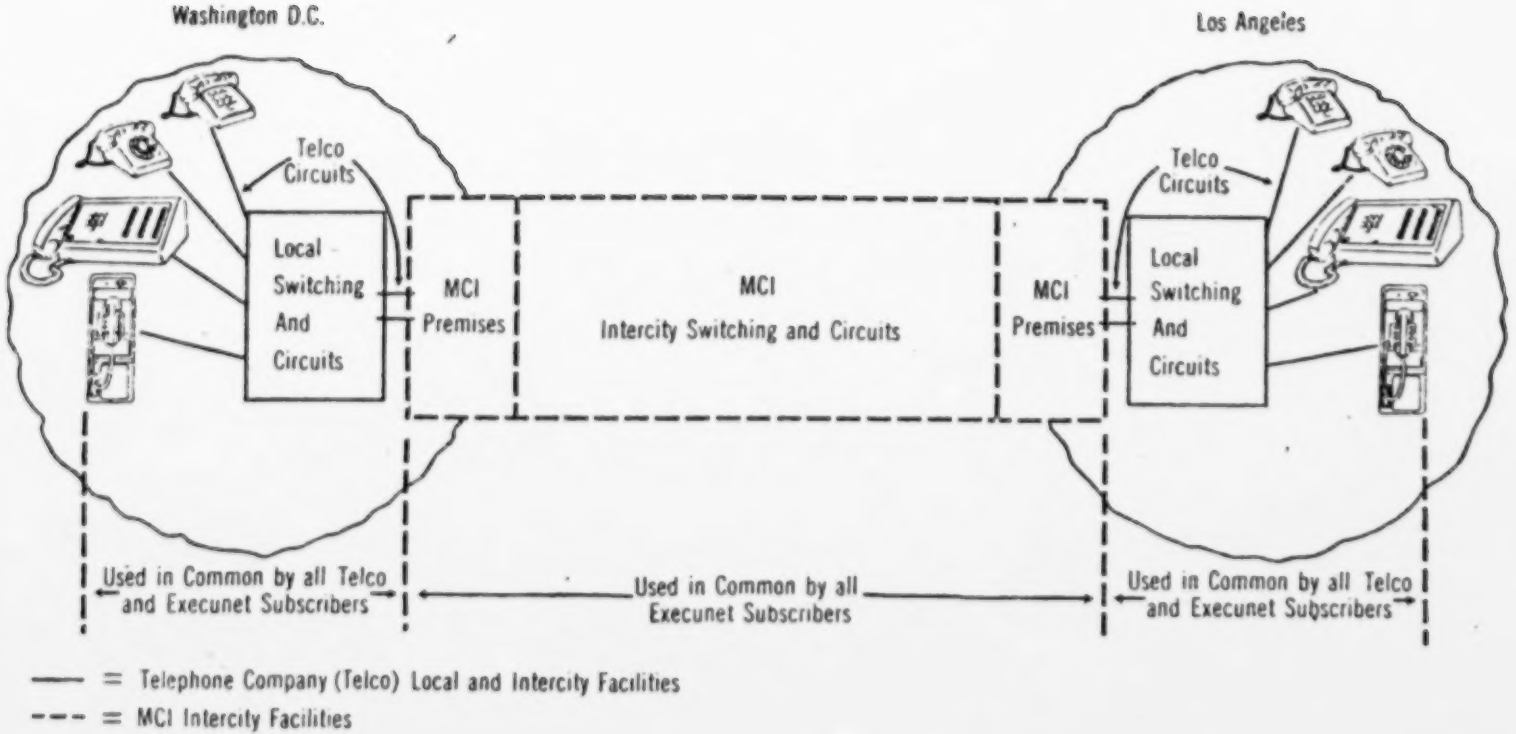
(b) With respect to any services and facilities not covered by the above-mentioned contracts but which are furnished by the Bell System companies for the use of Western Union in connection with the provision of its authorized interstate communications services, the telephone companies shall furnish the said interconnection facilities on reasonable terms and conditions; and charge Western Union for the provision of such interconnection facilities solely and exclusively pursuant to tariffs filed with this Commission pursuant to Section 203 of the Communications Act and Part 61 of the Rules.

APPENDIX H

AT&T'S LONG DISTANCE MESSAGE TELECOMMUNICATIONS SERVICE



MCI's EXECUNET



APPENDIX I

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

MCI TELECOMMUNICATIONS CORPORATION, Microwave Communications, Inc., and N-Triple-C Inc., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

American Telephone and Telegraph Company, United States Independent Telephone Association, Data Transmission Company (DATRAN), and Southern Pacific Communications Company, Intervenors.

No. 75-1635.

Argued April 28, 1977.

Decided July 28, 1977.

Before J. SKELLY WRIGHT, TAMM and WILKEY, Circuit Judges.

Opinion for the court filed by J. SKELLY WRIGHT, Circuit Judge.

J. SKELLY WRIGHT, Circuit Judge:

This is a petition to review two orders of the Federal Communications Commission, each of which requires petitioner MCI Telecommunications Corporation to cease and desist from offering and operating its "Execunet" telephone service.[1] Finding that the Commission has not taken the steps required by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1970), to restrict the services MCI may offer over its *existing* facilities, we reverse.

[1] The orders are a letter order of July 2, 1975 (FCC 75-799) and the *Decision* in *FCI Telecommunications Corp.*, 60 FCC2d 25 (July 13, 1976). The letter order is set out at Appendix B of the second order, 60 FCC2d at 62-64.

I. Background

MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C Inc. (hereinafter, collectively, MCI) are affiliated communications common carriers which operate a transcontinental point-to-point microwave system catering to business and data communications markets. In the vernacular of the trade MCI is a "specialized common carrier."

The present dispute has its roots in MCI's September 1974 filing of revisions to its tariffs F.C.C. No. 1—the tariff under which MCI furnishes all its interstate services. Those revisions, which became effective October 10, 1974, established rates for a class of "metered use" services, among which was Execunet.[2] With Execunet a subscriber using any push-button telephone (or rotary dial phone and tone generator) can reach any telephone in a distant city served by MCI simply by dialing a local MCI number followed by an access code and the number in the distant city. Execunet customers are billed for each call on a time and distance basis, subject to a monthly minimum.[3]

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[2] Apparently the tariffs do not themselves define Execunet service, but define only certain "modular" services and rates therefor. Putting these modular services together in a particular way results in the Execunet service package. The term "metered use" refers to the fact that charges for some services are set on a usage basis.

[3] Execunet's characteristics are summarized as follows.

> A customer in the calling city calls the local MCI office via local exchange telephone service from any push-button telephone in the local exchange area. A rotary-dial telephone can also be used if the caller has a touch-tone pad (tone generator). This device can be purchased in the open market from numerous sources. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Connection at the distant end may again be accomplished via the local exchange telephone service in that area. Upon connection, the customer is charged a per-minute toll, based upon the mileage to the city called, subject to a

In the spring of 1975 intervenor AT&T, after subscribing to Execunet and procuring Execunet marketing brochures, complained orally to the Commission that MCI was offering interstate long distance message telephone service (MTS) under the guise of Execunet and that no such service could properly be tariffed by MCI. Apparently AT&T representatives approached individual commissioners and various Commission staff personnel with this complaint and even held a demonstration of Execunet in the Commission's offices. Subsequent to the *ex parte* complaints, AT&T filed with the Commission a letter which repeated the allegations previously made.

The Commission forwarded AT&T's letter to MCI and indicated that MCI's "comments on this matter would be appreciated."[4] MCI wrote a series of letters in return. In the first it took the position that AT&T's complaint was untimely and should be rejected, but that in any case Execunet was a "private line" service which MCI was authorized to offer.[5] By a further letter MCI complained of AT&T's *ex parte* "lobbying" and asked for an opportunity to present its side of the dispute to the Commis-

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connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand.

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 26 n.1.

[4] Letter from FCC to MCI, May 1, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 64, JA 8.

[5] Letter from MCI to FCC, June 5, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 65-68, JA 9-15.

sion.[6] In a third letter MCI pointed out that its licenses were not limited by anything in Section 21.705 of the Commission's rules [7] pursuant to which point-to-point microwave radio licenses are issued to communications common carriers.[8] It also called the Commission's attention to AT&T's comments in Rulemaking Docket 19117,[9] in which AT&T had taken the position that the Commission had no statutory authority to require prior approval of new services that were to be offered over existing facilities of a domestic carrier, but instead could regulate such services, if at all, only under the tariff provisions of the Communications Act. In MCI's view, AT&T's position in Docket 19117 [10] denies the authority asserted by the Commission in the instant proceeding on AT&T's behalf. MCI also pointed out that the report in Docket 19117 states that

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[6] Letter from MCI to FCC, June 9, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 69-70, JA 16-18.

[7] § 21.705 Permissible communications.

> Stations in this service are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization or limited by § 21.701 or § 21.703 [the latter rules relating to frequency use]. • • •

47 C.F.R. § 21.705 (1976).

[8] Letter from MCI to FCC, July 1, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 80-84, JA 39-48.

[9] *In the Matter of Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities, and Amendment of Part 63.60-63.90 of the Rules, Notice of Proposed Rule Making,* 27 FCC2d 36 (1971); *Report and Order,* 39 FCC2d 131 (1973).

[10] *See Letter, supra* note 8, 60 FCC2d at 82-83, JA 44-46.

new service offerings could be proposed by merely filing a tariff.[11]

Without holding a hearing or even disclosing the details of AT&T's arguments concerning the unlawfulness of Execunet, the Commission on July 2, 1975 wrote a letter to MCI which stated: "[Y]our tariff F.C.C. No. 1 is hereby rejected insofar as it purports to offer Execunet service, but without prejudice to MCI's offering any other service which you are authorized to provide."[12] The rationale for this order was explained in the body of the letter.

First, the Commission concluded that MCI could offer only "private line" communications services over its existing facilities:

> In the various Commission orders granting the Section 214 applications of the MCI carriers to construct and operate facilities (e. g., 32 F.C.C.2d 36 (1971), FCC 72-456 (May 26, 1972), FCC 72-832 (September 22, 1972), FCC 72-852 (September 29, 1972)), appears language similar to the following:
>
> > The service proposed is essentially private line for the transmission of data, facsimile, control, remote metering, voice and other communications.
>
> Each grant refers to the paragraph which incorporates the above language as conditioning the grant of construction and operating authority. As a result, MCI is only permitted to operate its facilities for private line services.

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[11] "[T]he termination of the rule making proposed herein will make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions • • •." *Report and Order, supra* note 9, 39 FCC2d at 135.

[12] *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 64.

Further, in our *Second Report* on domestic satellites, which followed the *Specialized Common Carrier* decision, we pointed out (35 F.C.C.2d 844, 853 (1972)):

> In encouraging multiple entry and the development of competition in the supply of domestic communications, we have maintained a distinction between the so-called monopoly switched telephone services now being furnished by AT&T and all other classes of existing and potential specialized services.

It is thus clear that MCI sought authorization to offer only private line services, and that it was granted authority to offer only such services.[13]

The Commission then rejected MCI's arguments that Execunet was a private line service like AT&T's "foreign exchange" (FX) service, deciding instead that "the combination of * * * similarities" between Execunet and AT&T's MTS made Execunet "essentially a switched public message telephone service * * *".[14]

MCI immediately filed a petition for review in this court and sought a stay of the Commission's order, arguing that the Commission had failed to comply with Section 4 of the Administrative Procedure Act,[15] its own rules governing informal complaints,[16] its own rules governing *ex parte* contacts,[17] Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204-205 (1970), and the Due Process

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[13] *Id.* at 63.

[14] *Id.*

[15] 5 U.S.C. § 553 (1970).

[16] 47 C.F.R. §§ 1.711-1.735 (1976).

[17] 47 C.F.R. §§ 1.1201-1.1251 (1976). *See also Rules Governing Ex Parte Communications*, 1 FCC2d 49 (1965).

clause. The request for a stay was granted.[18] Subsequently the Commission, which had previously refused to allow MCI any kind of hearing, moved to have the proceedings remanded so that it could consider matters more fully than it had previously. This motion was granted, although jurisdiction was retained.

In December 1975 the Commission issued an order commencing the proceedings on remand. *MCI Telecommunications Corp.*, 57 FCC2d 271 (1975), SA 49.[19] It announced that comments and reply comments would be accepted and that oral argument or an evidentiary hearing might be held if warranted by the written submissions. The issue to be resolved was said to be "whether or not Execunet is a service which MCI is authorized to offer pursuant to its facility authorizations and policies set forth by this Commission."[20] On March 26, 1976 the Commission announced that it would hold oral argument and designated the issues to be addressed at that time. The issues the Commission identified as having been raised by the comments and reply comments were the following:

a. What class or classes of service is MCI permitted to offer pursuant to its facility authorizations and Commission policies?

b. What changes, if any, were made to the permitted classes of service by our Report and Order in Docket 19117, 39 FCC2d 131 (1973)?

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[18] This court initially stayed the Commission's order in its entirety. After the proceedings on remand our order was modified to allow MCI to continue to serve its present customers, but solicitation of new customers was not permitted.

[19] "SA" refers to a two-volume Supplemental Appendix covering the proceedings on remand.

[20] *MCI Telecommunications Corp.*, 57 FCC2d 271, 271-272 (1975), SA 49-50.

c. Is Execunet service, as presently offered, a private line service?

d. Were any communications between parties to this proceeding and the Commission, as developed by filings herein, in violation of any applicable statute or regulation?

e. If any prohibited contacts occurred, what effect have they had on the substance of this proceeding?

f. Whether any further proceedings are required to comport with the requirements of due process of law.

MCI Telecommunications Corp., 58 FCC2d 962, 963 (1976), SA 812.

Prior to oral argument the Commission issued yet a third order responding to procedural motions made by MCI at various points during the comment period. *MCI Telecommunications Corp.*, —— FCC2d —— (FCC 76-441, May 17, 1976), SA 892. In this order the Commission rephrased the primary issue before it as "whether MCI's facility authorizations and Commission policies restrict in any way the broad categories of service which MCI may offer." [21] It also stated that the proceedings would not be expanded to include consideration of "whether it is in the public interest for MCI to offer Execunet regardless of whether it is within the class of services it may offer." [22] Finally, the Commission for the first time mentioned the statutory authority for its actions: "th[is] proceeding is an investigation into the lawfulness of MCI's Execunet service offering, conducted pursuant to Sections 4(i), 4(j), 201, 204, 205, 208 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 204, 205, 208 and 403." [23]

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[21] *MCI Telecommunications Corp.*, —— FCC2d —— (FCC 76-442, May 17, 1976), SA 894.

[22] *Id.*, SA 895.

[23] *Id.*

After oral argument the Commission issued an extensive opinion, again finding that MCI was not authorized to offer Execunet. *MCI Telecommunications Corp.*, 60 FCC2d 25 (1976). The approach taken in that opinion is materially different from that taken in the July 1975 letter order, however. Whereas the letter order had relied on express restrictions written into MCI's facilities authorizations (the certificates of public convenience and necessity issued pursuant to Section 214(a) of the Communications Act, 47 U.S.C. § 214(a) (1970)),[24] the opinion on remand stated:

> As MCI points out, however, not all of its authorizations contain similar language [*i. e.*, restrictions], some contain no such restrictions, and thus it is necessary to look further, to our expressed policies and to judicial statements, to ascertain the limits on [specialized common carrier] services.[25]

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[24] (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line • • • • • • No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby • • •. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

[25] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 35.

The Commission's "further look" began with a review of the seminal *Specialized Common Carrier* decision,[26] pursuant to which most specialized carrier facilities authorizations have been issued. The purpose of that decision was to facilitate the Commission's handling of Section 214 applications by determining by rulemaking "[w]hether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field * * *"[27] While the Commission apparently concedes that it did not define the boundaries of the "specialized communications field,"[28] it asserts that the services to be offered over the facilities covered in some 1,700 Section 214 applications before it provided a touchstone for its analysis and that all such services were "private line." Accordingly, it is the Commission's position that it did not consider services other than private line services in determining the public interest ramifications of competition.[29] As an example of this the Commis-

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[26] *Specialized Common Carrier Services*, 29 FCC2d 870 (1971), *aff'd, sub nom. Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975). *See also Bell Telephone Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed.2d 684 (1975); *AT&T v. FCC* [*United States Transmissions Systems, Inc.*], 176 U.S.App.D.C. 288, 539 F.2d 767 (1976).

[27] *Specialized Common Carrier Services, supra* note 26, 29 FCC 2d at 878.

[28] *See* note 68 *infra*.

[29] 35. At the time of the *Specialized Common Carrier* decision, we had before us 1712 microwave applications from 33 applicants, 17 of which were affiliated with MCI. Accordingly, the statements of MCI as to the types of services it proposed to offer were of importance in the policy determination made therein and are helpful in ascertaining the limits, if any, imposed upon Specialized Common Carrier (SCC) service offerings. The MCI applications considered were for "portions of a proposed nationwide network to provide specialized *private*

sion points to its analysis of "cream-skimming," the argument that specialized carriers will upset the established rates of general carriers (such as AT&T) by siphoning off high-profit business.[30] The Commission's interpretation here of its discussion of cream-skimming in *Specialized Carriers* is that it found allegations of cream-skimming to be unfounded only because the specialized carriers were not proposing to compete "to any substantial degree" with AT&T's monopoly service offerings, MTS and WATS.[31]

Having concluded that the *Specialized Common Carrier* decision makes no reference to competition in other than private line areas, the Commission turned next to MCI's

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> *line* communications services" (emphasis added) 29 FCC2d at 874. We further quoted MCI's pleadings that "the real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability" 29 FCC2d at 875. Finally MCI asserted that there was a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private line basis, *Id.* [*sic*] Thus, MCI sought therein to offer only private line, point-to-point services. • • •

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 36. *See also* FCC Letter Order, *id.*, Appendix B, 60 FCC2d at 62:

> *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), which established the Commission's policies regarding entry of the specialized common carriers in competition with AT&T, contemplated such entry only in the private line field, not in the area of switched public message telecommunications service. • • •

[30] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 910 (¶ 78).

[31] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 36, quoting *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 915.

allegations concerning the meaning of the Commission's Rule 21.705, 47 C.F.R. § 21.705 (1976), and its orders in Docket 19117.

Rule 21.705 governs the scope of licenses granted carriers in the point-to-point microwave service. Its operative language is that a carrier may offer any service "provided for in the *legally applicable tariffs* of the carrier, unless otherwise directed in the applicable instrument of authorization * * *" (emphasis added). MCI, focusing on the second phrase, had argued that the absence of any directions in its instruments of authorization indicated that it was free to offer by tariff *any* communications service that could physically be provided on its existing system. The Commission, on the other hand, took the position that the italized language is the key and that tariffs exceeding the bounds of the *Specialized Carrier* decision can never become "legally applicable." Thus in the Commission's view Rule 21.705 merely "expresses the truism that a carrier need not generally file an application [under Section 214] for each new service it wishes to offer, [and therefore] it cannot be used to reverse a clearly defined Commission policy." [32]

The Commission takes a similarly narrow view of the effect of its *Report and Order* in Docket 19117. That docket was started to consider whether domestic carriers should be required to get Commission approval before filing tariffs proposing services not previously provided or set out in a Section 214 application.[33] The purpose of the proposed rules was threefold: to decide the public interest ramifications of a service before it was commenced, thereby protecting the public from service disruptions that might be caused if the service were allowed to go into effect and

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[32] *Id.* at 38.

[33] *See Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38-39.

later enjoined; to put general domestic carriers (such as AT&T and Western Union), which could theretofore start a new service simply by filing a tariff, on an equal footing with international and domestic miscellaneous carriers whose facilities authorizations were always restricted so that new servives required further Section 214(a) proceedings; and to protect entrants to the specialized carrier field who also needed prior approval of entry under Section 214(a) from unfair competition from the generalized carriers.[34] The proposed rules were never adopted, and restrictions in facilities authorizations which had worked a result similar to the proposed rules were expressly declared "null and void" in the order terminating the docket.[35]

MCI argued before the Commission that the result of Docket 19117 was that any express restrictions in its facilities authorizations were lifted and that it should be free as a result of the order terminating the docket to propose new services simply by filing a tariff, even if it was not free before. The Commission's response was that Docket 19117 was not concerned with competition except in the specialized carrier field—the only field in which competition was allowed at the time of the *Report and Order* in that docket.[36] Thus the Commission's view apparently is that existing specialized carriers are allowed to offer private line services free of any prior approval requirement as a result of Docket 19117, but are required to proceed by Section 214 application with respect to all other services.

In the remainder of the opinion below the Commission again concluded that Execunet was not a private line serv-

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[34] *Id.* at 39.

[35] *See Report and Order, supra* note 9, 39 FCC2d at 137.

[36] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 39.

ice.[37] It also concluded that no facts were in dispute which required an evidentiary hearing and denied MCI's motion for one.[38] The Commission for a second time refused to consider whether Execunet should be permitted regardless of the scope of the *Specialized Common Carrier* decision, and further indicated that it had intended to confer on AT&T a monopoly over MTS and WATS by its ruling in *Specialized Carriers,* a decision that could not be changed absent a demonstration of changed circumstances.[39] Finally, the Commission refused to inquire further into the *ex parte* contact problem on the ground that all such contacts had occurred before commencement of formal proceedings and were, therefore, proper under both court and Commission rulings.[40]

On this petition for review MCI has challenged virtually every ruling of the Commission in the proceeding on remand and has renewed its attack on the July 1975 letter order.

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[37] *See id.* at 40-44.

[38] *Id.* at 44-48.

[39] [W]e disagree with MCI that we have never defined the areas of telecommunications service which should be open to competition and those which are a monopoly. Rather, that was the principal purpose of our investigation in [*Specialized Carrier Services, supra* note 26]. • • •

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109. In essence MCI is • • • asking us to reopen the *Specialized Common Carrier* decision to determine again what services should be open to competition. We decline to do so. • • • There is no allegation that the public interest considerations upon which the *Specialized Common Carrier* [was] based have changed at all • • •.

MCI Transcommunications Corp., supra note 1, 60 FCC2d at 56-57.

[40] *Id.* at 48-54.

II. Analysis

A.

The implicit restrictions argument advanced by the Commission in its opinion on remand represents a substantial departure from prior administrative practice. As the Commission's letter order suggests, the usual way in which a carrier becomes restricted in the services it may offer is for the Commission to write restrictions into the facilities authorizations that must be obtained pursuant to Section 214 of the Communications Act before any communications line may be built, operated, or extended.[41] Accordingly, a carrier can usually tell if it is subject to service restrictions simply by examining the instruments of authorization issued to it by the Commission. Section 21.705 of the Commission's rules, 47 C.F.R. § 21.705 (1976), which governs the manner in which point-to-point microwave radio licenses can be used by specialized carriers such as MCI, similarly recognizes that the usual place to find restrictions on services is in the "applicable instrument of authorization." *See also* 47 U.S.C. § 309(h)(1) (1970) (which indicates that restrictions will usually be found in the license instrument); 47 C.F.R. § 21.903(b) (1976) (instrument of authorization controls in part services that may be offered on a multi-point distribution system).

The Commission's discussion of its administrative practice in Docket 19117 is also instructive. There the Commission explained that in the absence of restrictions imposed under Section 214 in the facilities authorizations, carriers could offer any service which could physically be provided over their existing systems simply by filing a tariff.[42] This discussion clearly indicates that the Commission's understanding of Section 214 of the Act has until now been that

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[41] *See* text at note 13 *supra*; note 24 *supra*.

[42] *See Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38; *Report and Order, supra* note 9, 39 FCC2d at 133.

explicit action is necessary to restrict a carrier to the service offerings it proposed when it sought authority to build, operate, or extend its communications lines.

Finally, as evidenced by the decision in *Press Wireless, Inc.*, 25 FCC 1466 (1958), *aff'd, sub nom. Press Wireless, Inc. v. FCC*, 264 F.2d 372 (D.C. Cir. 1959) (*per curiam*), the Commission has from time to time exercised its express authority under Section 303(b) of the Act, 47 U.S.C. § 303(b) (1970), to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class" by promulgating rules setting out limitations on services to be offered over radio facilities. *See, e. g.*, 47 C.F.R. §§ 21.509, 21.606, 21.903 (1976). In this regard it is instructive to note that the Commission has *not* enacted any comparable services restrictions for point-to-point microwave licensees and in particular it has *not* made the definition of "private line service" set out in 47 C.F.R. § 21.2 (1976) applicable to such licenses, although this would certainly seem to be the natural thing to have done had the Commission sought to restrict specialized carriers to private line service offerings.

The fact that an administrative practice is novel does not, of course, mean that it is wrong. However, novelty is a warning signal that all may not be well, especially in the instant case in which the Commission has itself failed to discuss the statutory warrant for the new course it has adopted. When the Communications Act is considered in detail, it becomes apparent that novelty has led to error in this case.

B.

To frame our analysis, we sketch at the outset some principles which are either uncontested or uncontestable. First, it is settled that "a tariff [may] be rejected if it is unlawful without prior agency approval and approval has not been obtained." *Associated Press* v. *FCC*, 145 U.S.App. D.C. 172, 448 F.2d 1095, 1103 (1971); *accord, Press Wire-*

less, Inc. v. FCC, supra.[43] Yet the power to require prior agency approval is itself circumscribed, for it is well recognized that the tariff provisions of the Communications Act (Sections 203-205, 47 U.S.C. §§ 203-205).[44] like the

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[43] *See also North Central Truck Lines, Inc. v. ICC*, 559 F.2d 802, 804 (D.C. Cir. decided June 6, 1977); *Delta Air Lines, Inc. v. CAB*, 177 U.S.App.D.C. 100, 543 F.2d 247, 254 (1976); *Municipal Light Boards of Reading & Wakefield, Mass. v. FPC*, 146 U.S. App.D.C. 294, 450 F.2d 1341, 1345-1346 (1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 445 (1972).

MCI has vigorously argued that rejection of a tariff is not possible once a tariff has become effective. We need not decide whether this is so since, as this case comes to us after remand, no facts material to the issues thus far decided by the Commission are in dispute and, accordingly, the Commission could, as it apparently did, issue a cease and desist order pursuant to 47 U.S.C. § 205 (1970) without more of a hearing than has already been afforded MCI. Thus, even if the Commission was without power to reject a tariff as that phrase is used as a term of art, it was empowered to reject the Execunet tariff in a practical sense.

[44] Under the Communications Act the practices of *existing* carriers using *existing* facilities are regulated primarily through the tariff mechanism established in §§ 203-205 of the Act, 47 U.S.C. §§ 203-205 (1970). Section 203 obliges carriers to file tariff schedules with the Commission and to make such schedules available to the public. Section 203(b) expressly recognizes that changes in the services a carrier may offer will be commenced with a tariff filing. Operation except in strict compliance with applicable tariffs is prohibited, 47 U.S.C. § 203(c), as are discriminations and preferences, *id.* § 202. Prior to the effective date of a tariff—a date certain that must be set out in the tariff, *id.* § 203(d)—the Commission may suspend the tariff and hold a hearing concerning the lawfulness thereof. *Id.* § 204. If the hearing has not been completed within three months (five months as of 1976, *see* 47 U.S.C.A. § 204 (1977 pocket part)) after the effective date of the suspended tariff, that tariff by law goes into effect. *Id.* After the effective date, and without regard to whether a tariff has previously been suspended, the Commission may hold a hearing on the lawfulness of the tariff, although the tariff must be allowed to remain in effect pending the outcome of such a hearing. *Id.* § 205; *see AT&T v. FCC*, 487 F.2d 865, 874-875 (2d Cir. 1973). Subsequent to a hearing under either § 204 or § 205 the Commission may prescribe such rates, classifica-

cognate sections of the Interstate Commerce Act (49 U.S.C. §§ 15(1), 15(7) (1970)),[45] embody a considered legislative judgment that carriers should in general be free to initiate and *implement* new rates or services over existing communications lines unless and until the Commission, after hearing, determines that such rates or practices are unlawful, subject only to a limited period of suspension set out in the statute. *AT&T v. FCC*, 487 F.2d 865, 870-881 (2d Cir. 1973); *see United States v. SCRAP*, 412 U.S. 669, 697, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (interpreting Interstate Commerce Act); *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 662-669, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963) (same).[46] As the Second Circuit ex-

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tions, regulations, or practices as shall be determined to be just, fair, and reasonable, and it may enjoin the carrier from continuing services except as prescribed. 47 U.S.C. §§ 204, 205.

[45] "Section 204 • • • is adapted from section 15(7) of the Interstate Commerce Act so as to apply to communications. • • • Section 205 follows sections 15(1) and 16(8) of the Interstate Commerce Act • • •." S.Rep.No.781, 73d Cong., 2d Sess. 4 (1934). *See also* H.R.Rep.No.1850, 73d Cong., 2d Sess. 5-6 (1934).

[46] Since the most likely objection to MCI's provision of Execunet service is its potential effect on AT&T's MTS, it is useful to note that the Supreme Court, in *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 669, 83 S.Ct. 984, 990, 10 L.Ed.2d 52 (1963), rejected the claim that a court should have the power to extend the statutory suspension period to protect competitors of a carrier and their customers:

> It must be admitted that Congress dealt with the problem as it affected the relations between shippers and carriers, making no express reference to the interests of competing carriers and their customers such as are involved in this case. We see no warrant in that omission, however, for a difference in result. • • •

In noting that neither claims of a carrier's customers nor those of its competitors or competitors' customers in any way abridge the right of a carrier to implement a new rate or service, we do not intend to suggest that a showing of harm to competitors or com-

plained in the *AT&T* case in overturning a Commission requirement that AT&T obtain approval prior to filing tariff revisions:

> In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.[47]

The Second Circuit, moreover, rejected the Commission's argument that the general grants of procedural authority in Sections 4(i), 4(j), and 403 of the Act, 47 U.S.C. §§ 154 (i), 154(j), 403 (1970), empowered the Commission to erect prior approval requirements like that imposed on AT&T, although it recognized that the Commission would have the power to reject a tariff whenever a section of the Act expressly establishes or authorizes [48] a prior approval requirement.[49]

Applying these principles to the instant case, the issues to be resolved are two: whether and to what extent Section

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petitors' customers would be insufficient to sustain a service restriction promulgated in accord with 47 U.S.C. § 214(c) (1970) or 47 U.S.C. § 303(b) (1970). Our only point is that allegations of harm to competitors or competitors' customers do not in any way expand the Commission's suspension or rejection powers.

[47] *AT&T v. FCC, supra* note 44, 487 F.2d at 880 (footnote omitted).

[48] Of course, if the statute merely authorizes the Commission to impose a prior approval requirement, as is the case with § 303(b), 47 U.S.C. § 303(b) (1970), that authority would have to be exercised before rejection is proper.

[49] *AT&T v. FCC, supra* note 44, 487 F.2d at 876-881 & 880 n.13, citing *Associated Press v. FCC*, 145 U.S.App.D.C. 172, 448 F.2d 1095, 1103 (1971).

214 of the Communications Act expressly authorizes the Commission to impose prior approval requirements through the facilities authorization mechanism, and whether the Commission has properly exercised whatever authority it may have under Section 214.

Section 214 establishes the Commission's regulatory charter over entry into the common carrier communications field and states that no carrier shall construct, extend, or acquire a line unless the Commission has first affirmatively determined that such entry would be in the public interest.[50] The primary purpose of Section 214(a) is prevention of unnecessary duplication of *facilities*, not regulation of services.[51] Because of this, Section 214 would appear to have a limited office with respect to regulation of service offerings on existing lines. We have held as much,[52] and this view is confirmed by the final proviso to Section 214(a) which states expressly that

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[50] *See* note 24 *supra*.

[51] *See* 78 Cong.Rec. 10314 (1934) ("The section [§ 214] is designed to prevent useless duplication of facilities, with consequent higher charges upon the users of services."). It is also clear that § 214 was intended to apply only to construction or acquisition of new lines. *See id.*; H.R.Rep.No.1850, *supra* note 45, at 6; S.Rep.No. 781, *supra* note 45, at 5; *accord, Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 355 (3d Cir. 1976); *United Telegraph Workers v. FCC*, 141 U.S.App.D.C. 190, 436 F.2d 920 (1970).

Of course, § 214 also applies to abandonment of service, *see* note 24 *supra*, but no one has so far contended that Execunet will have any impact, adverse or otherwise, on provision of preexisting MCI services.

[52] In the first Western Union Mailgram case, *United Telegraph Workers v. FCC*, *supra* note 51, the Telegraph Workers sought to force the FCC to enjoin Mailgram service pending a hearing at which § 214 issues could be ventilated. The Commission, on the other hand, maintained that the Mailgram tariff should be processed in the same manner as any other tariff filing. This court sided with the Commission on the ground that (with exceptions not relevant here) § 214 did not apply to even this novel use of existing facilities. *See* 436 F.2d at 924-925.

> nothing in this section [214] shall be construed to require a certificate or other authorization from the Commission for any * * * changes in plant, *operation,* or equipment, *other than new construction,* which will not impair the adequacy or quality of service provided.[53]

Moreover, we do not agree with the suggestion of Commision counsel in brief [54] that Judge Wilkey's opinion in *Hawaiian Telephone Co. v. FCC,* 162 U.S.App.D.C. 229, 498 F.2d 771 (1974), somehow transmogrifies Section 214 (a) so that carriers must now obtain Commission approval before they implement new services.[55] In *Hawaiian Telephone* this court reversed a grant of Section 214 authority to RCA Global Communications, Inc. on the ground that the Commission was allowing competition merely for competition's sake in direct violation of the teaching of the Supreme Court in *FCC v. RCA Communications, Inc.,* 346 U.S. 86, 73 S.Ct. 998, 97 L.Ed. 1470 (1953). In stating the proper standard to be applied under Section 214(a) Judge Wilkey wrote: "When the FCC considers an application for certification of a new line, it must start from the situ-

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[53] 47 U.S.C. § 214(a) (1970) (emphasis added); *see* note 24 *supra.*

[54] FCC brief at 24 & n.14, 32 n.23.

[55] If this were the case, then there would obviously have been no need for the rulemaking in Docket 19117 which proposed rules that would have required "common carriers [to] request prior Commission approval before offering or discontinuing any new or revised classification of communications, irrespective of whether offered over proposed new facilities or over facilities previously authorized by the Vommission [*sic*]." *Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38-39. Similarly, if the Commission is now correct, then both the Commission and this court were in error in *United Telegraph Workers v. FCC, supra* note 51. *See* note 52 *supra. See also MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 38 ("a carrier need not generally file an application [under § 214] for each new service it wishes to implement").

ation as it then exists, and must * * * determine whether indeed the public convenience and necessity requires more or better service." 498 F.2d at 776 (emphasis added). We do not read this statement to suggest that every time a carrier seeks to start a new service over existing facilities it must petition the Commission under Section 214(a), but rather it is merely a matter of fact observation that it is analytically impossible to determine the need for a new facility without considering the services to be provided over it. In addition, the reading suggested by the Commission would nullify the final proviso of Section 214(a) by requiring a "certificate [and] other authorization from the Commission" prior to changes in carriers' operations even if such changes did not affect the "adequacy or quality" of the carriers' preexisting services. There is no indication that the *Hawaiian Telephone* court contemplated such a remarkable result. Nor, indeed, can such a result be justified by reference to the primary purpose of Section 214 because, so long as the "adequacy or quality" of the service proposed in a Section 214(a) application is not impaired by provision of other services, the public need that justified construction of facilities will still be met and there is no sense in which those facilities would have become needlessly duplicative.

Notwithstanding the proviso to Section 214(a), Section 214(c) gives the Commission authority to [56]

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[56] Section 214(c) provides:

> The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of

> issue such certificate [facility authorization] as applied for * * * or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions *as in its judgment the public convenience and necessity may require.* * * *

(Emphasis added.) Used to condition the services an individual carrier may offer, Section 214(c) would provide a power over individual carriers in all respects identical to its power over classes of carriers under Section 303(b), which was held in *Press Wireless, Inc. v. FCC, supra,* to give the Commission authority to create a prior approval requirement. For this reason Section 214(c) does, in our judgment, authorize the Commission to restrict the services that may be offered over a communication line once it is built, acquired, or extended. *Cf. Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 355 (3d Cir. 1976). However, since any prior approval requirement is in derogation of the legislative compromise embodied in Sections 203-205, the Commission must strictly follow the terms of Section 214(c) and it cannot impose any such restriction unless it has affirmatively determined that "the public convenience and necessity [so] require."

C.

With the framework of our inquiry in mind, we turn next to the question whether the Commission was correct

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> such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

47 U.S.C. § 214(c) (1970).

in concluding that the *Specialized Common Carrier* decision was a lawful exercise of Section 214(c) authority. As we understand the Commission's opinion on remand, there are two considerations supporting its view that the *Specialized Common Carrier* decision restricted the services specialized carriers can offer—first, the fact that only private line services were before the Commission in Section 214 applications [57] and, second, that the Commission's analysis of cream-skimming assumed that specialized carriers would be restricted to private line services.[58] We consider these in turn.[59]

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[57] *See* note 29 *supra*.

[58] [O]ur analysis of possible revenue diversion (29 FCC2d at 911-914) dealt only with the private line revenues of these two carriers. Further, we recognized that SCCs would not compete directly with the established carriers' message services. "There is no reason to believe that [nationwide average] pricing of the interstate message service offerings of the Bell System and Western Union (such as MTT, WATS, and public telegraph) need be altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear in jeopardy *since those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants.*" 29 FCC2d at 915 (emphasis added) [.]

MCI Telecommunications Corp., supra note 1, 60 FCC2d at 36.

[59] The Commission offered two other considerations in support of its interpretation of *Specialized Common Carrier Services, supra* note 26. First, it concluded that specialized carriers would not duplicate services already being offered, whereas in the Commission's view Execunet would duplicate MTS. We fail to see the relevance of this assertion in light of *AT&T v. FCC, supra* note 26.

The Commision also pointed to statements made by the Ninth and Third Circuits in, respectively, *Washington Utilities & Transportation Comm'n v. FCC, supra* note 26, and *Bell Telephone Co. v. FCC, supra* note 26. In *Washington Utilities*, however, the scope of the services authorized in *Specialized Carriers* was not at issue; the reference is simply a general description of the services pro-

We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision. Nonetheless, it is readily apparent that failure to consider the public interest ramifications of a service—either pro or con—during resolution of a Section 214(a) application is simply not the same thing as an affirmative determination that the "public convenience and necessity may require" [60] a restriction on a facility authorization limiting a carrier to provision solely of those services proposed in its Section 214(a) application.

The Commission's analysis of cream-skimming in the *Specialized Common Carrier* decision similarly give no evidence that the Commission made an affirmative finding that revenue diversion would be a problem if specialized carriers were allowed to compete on the fringes of the message telephone service market as MCI allegedly proposes to do.

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posed in the applications before the Commission. The *Bell Telephone* case involved a very different issue, namely, whether the Commission had affirmatively determined that it would be in the public interest to require AT&T to interconnect with MCI for the purpose of allowing MCI to offer FX and CCSA service. *See* 47 U.S.C. § 201(a) (1970). The Commission's view was that *Specialized Carriers* had settled the point, whereas AT&T argued that, since MCI had never mentioned FX and CCSA services in its § 214(a) applications, MCI's provision of those services had not been approved even if some other carriers might have been. The Third Circuit held that the Commission in *Specialized Carriers* had made an affirmative determination that interconnection for provision of private line services was a general matter in the public interest and that MCI was covered by this general determination. *Bell Telephone* therefore stands for the proposition that the Commission in *Specialized Carriers* decided at least that specialized carriers could provide all private line services. However, one cannot reason from this proposition to its converse—that specialized carriers may offer only private line services—yet the converse is the issue relevant under § 214(c) as we explain in text.

[60] 47 U.S.C. § 214(c) (1970).

No such issue was before the Commission in that proceeding. As it has repeatedly asserted here, all it had to consider was whether the competition proposed in the Section 214 applications before it raised serious revenue diversion problems threatening the public interest. This is all it apparently did decide:

> [W]e do not see how there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihood that AT&T would obtain a very substantial share of the potential market for specialized services.[61]

Moreover, the Commission's staff report, which formed the basis for the *Specialized Carrier* decision, ruminated more broadly on the issues posed by revenue diversion and it appeared highly skeptical of the validity of AT&T's overall argument.[62] Thus there is simply nothing in *Specialized Carriers* that would support a conclusion that revenue diversion required restrictions on MCI's facility authorizations.[63]

Finally, it should also be noted that the Commission staff, in its report adopted by the Commission,[64] dealt ex-

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[61] *Specialized Common Carrier Services, supra* note 26, 29 FCC 2d at 910.

[62] *See id.* at 883-884.

[63] It should also be noted that subsequent to *Specialized Carriers* the Commission has indicated a willingness to consider competition in the message telephone field on its merits. *See Domestic Communications-Satellite Facilities,* 35 FCC2d 844, 853-854 (1972). To a large extent this undercuts the Commission's argument here, *see* note 39 *supra,* that it conferred a statutory monopoly on AT&T in this field.

[64] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 920 (¶ 103) ("In light of all of the foregoing and the

plicitly with the question of how the Commission ought to deal with possible adverse impacts of service offerings other than those which were before the Commission in the *Specialized Common Carrier* decision:

> In the event that adverse consequences to the public should develop, the Commission can take such action *on the relevant tariff filings* as may be necessary to protect the public. We think that in the context of the matters now before the Commission involving proposed new and different services, *a question of this nature is more appropriately considered in connection with the tariffs rather than upon authorization of the facilities.*[65]

And, again, the staff wrote:

> The results of any authorizations would be the object of close and continuous scrutiny by the Commission. Should adverse consequences develop or appear imminent, the Commission can take such remedial action or precautionary measures as may be necessary to protect the public. *As indicated, appropriate action can be taken in connection with the tariffs.* In addition, any renewal of license for the proposed facilities would require a public interest finding and could be subject to any needed conditions. Moreover, the Commission's broad rule making powers are always available. • • • [66]

The undeniable import of the staff's analysis is that questions related to the future impact of specialized carrier service offerings other than those immediately at hand in

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record as a whole, we adopt our staff's analysis • • • as amplified and modified herein.''). There is no indication that the Commission ''modified'' the staff's analysis of the points relevant to this appeal.

[65] *Specialized Common Carrier Services, supra* note 26, 29 FCC 2d at 886 (emphasis added).

[66] *Id.* at 887 (emphasis added).

the *Specialized Common Carrier* case should be resolved in other proceedings—in tariff proceedings, upon license renewal, or by further rulemaking. Strikingly absent from this list is a mention of further Section 214 proceedings.

For the reasons stated above the Commission's *Specialized Common Carrier* decision cannot reasonably be read to have made an affirmative determination that the public convenience and necessity required "private line" restrictions on the facilities authorizations of specialized common carriers.[67] Instead, it appears that the Commission saw benefits accruing to the public from the services which were before it. In granting the facilities authorizations on the basis of that public interest finding, the Commission did not perhaps intend to open the field of common carrier communications generally, but its constant stress on the fact that specialized carriers would provide new, innovative, and hitherto unheard-of communications services clearly indicates that it had no very clear idea of precisely how far or to what services the field should be opened.[68] As indicated in the staff report, a decision was apparently made to consider the consequences of future developments in appropriate future proceedings. There being no affirmative determination of public interest need for restrictions, MCI's facility authorizations are not restricted and therefore its tariff applications could not properly be rejected.

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[67] For this reason the deference normally owed to our agency's interpretation of its own decisions, *see, e.g., Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965), is not appropriate here. *See id.* at 18, 85 S.Ct. 792.

[68] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 905-914 (¶¶ 65-86). Indeed, to the extent that any definition of a specialized common carrier emerges from the Commission's discussion, that definition appears to be simply that a specialized carrier is any carrier that does not attempt to optimize its service offerings to the voice communications needs of the general public. *See id.* at 882 (¶ 29); *id.* at 906-907 (¶¶ 69-70).

D.

As a final and somewhat collateral point, we are concerned with a thread running through the Commission's analysis—that the *Specialized Carrier* decision granted AT&T a *de jure* monopoly over MTS and WATS service which would be undermined were MCI allowed to provide Execunet—because any such assertion is plainly incorrect and may have influenced the Commission's disposition of the instant case.

As the Commission staff explained in *Specialized Carriers,* absence of competition in the "general domestic common carrier service field * * * is due primarily to the fact that until the filing of [MCI's first Section 214 applications] the Commission had no occasion to consider applications for competitive service in this area." [69] The question whether AT&T should be granted a *de jure* monopoly was not among those proposed to be decided in *Specialized Carriers,* and nowhere in that decision can justification be found for continuing or propagating a monopoly that, according to the staff, had theretofore just grown like Topsy. Of course, there may be very good reasons for according AT&T *de jure* freedom from competition in certain fields; however, one such reason is not simply that AT&T got there first. Indeed, the Commission's attempt here to imbue AT&T's existence with public interest significance represents a retrenchment from the position it took in passing on a proposal to enter the MTS field via domestic communications satellites: "[W]e should not reject any proposal that might prove feasible and beneficial to the public simply because it represents some departure from the established scheme." *Domestic Communications-Satellite Facilities,* 35 FCC2d 844, 854 (1972).

Because the Commission has not so far determined that the public interest would be served by creating an AT&T

[69] *Id.* at 881.

monopoly in the interstate MTS field, it may not properly draw any inferences about the public interest from the bare fact that another carrier's proposed services would compete in that field.

III. Conclusion

We have today decided that the Commission erred in rejecting MCI's Execunet tariff as unauthorized. The Commission has no general authority to insist that carriers receive its approval before filing tariffs proposing new services or rates. Only if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized. In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings. In that eventuality the Commission must be ever mindful that, just as it is not free to create competition for competition's sake,[70] it is not free to propagate monopoly for monopoly's sake. The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of *de facto* monopoly.[71]

Reversed and remanded.

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[70] *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97, 73 S.Ct. 998, 97 L.Ed. 1470 (1953); *Hawaiian Telephone Co. v. FCC*, 162 U.S.App.D.C. 229, 498 F.2d 771, 776-777 (1974).

[71] *Cf., e.g., Carroll Broadcasting Co. v. FCC*, 103 U.S.App.D.C. 346, 258 F.2d 440, 443 (1958).

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Petitioner,

v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER

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REPLY OF PETITIONER

Certiorari has been sought to review the opinion and order below by American Telephone and Telegraph Company in this case, by the Federal Communications Commission in No. 78-270, and by the United States Independent Telephone Association in No. 78-216. This reply is filed by AT&T in response to oppositions to certiorari filed by MCI and by Southern Pacific Communications Company ("SPCC").

I. The Lower Court's Unlawful Exercise of An Administrative Power Violates Settled Restrictions on Judicial Review Imposed by This Court.

Contrary to settled decisions of this Court which circumscribe judicial power,[1] the lower court has *affirmatively ordered* the FCC to exercise in a particular way a discretionary power conferred by Congress exclusively upon the FCC. Neither the rhetoric of MCI nor the assurances of SPCC can obscure the extraordinary step taken by the District of Columbia Circuit in this case.

Section 201(a) of the Communications Act gives the FCC alone the power to order interconnection between carriers and requires that such orders be based on public interest findings. The FCC unequivocally states that it has never ordered interconnection for switched public message service like Execunet.[2] Further, the lower court itself conceded that the FCC has never affirmatively found that the offering of switched public message service by specialized carriers would serve the public interest.[3] It follows *a fortiori* that no public

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[1] *E.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952); *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council*, 98 S. Ct. 1197 (1978).

[2] The FCC's determination that its prior interconnection orders in *Full System Tariff Offerings* were limited to specialized private line service is directly supported by the facts and rationale of those orders; by the Third Circuit's reasoning and holding; and by the deference due to an agency construing its own orders. See AT&T Pet. 5-6, 13.

[3] In *Execunet*, the lower court itself held that the FCC had never affirmatively decided whether or not competition for switched public message service would serve the public interest. See 561 F.2d at 378, 380 (AT&T Pet. App. 25i, 29i-30i). Such an affirmative

interest finding can have been made sufficient to support an interconnection order for that service pursuant to Section 201(a). Yet the lower court, lacking the necessary FCC interconnection order or public interest findings, nevertheless ordered the FCC to require interconnection for a switched public message service.

This Court has consistently and emphatically held that a reviewing court may not "exercise an essentially administrative function."[4] Were the FCC to order Execunet interconnection without the necessary public interest findings, this would clearly violate Section 201(a). For the lower court to require such interconnection is an even more serious breach of Congress' will: it means that the lower court has superseded the authority expressly conferred by Congress on the agency and has "judicially" embarked upon a determination of communications policy.

The respondents' attempts to rationalize the lower court's action only underscore its impropriety. MCI and SPCC assert that the lower court's extraordinary interconnection order was nothing but enforcement of its *Execunet* mandate. MCI Br. 15-18; SPCC Br. 13-14. The infirmity of this argument goes far beyond its misapplication of well-settled rules concerning the interpretation and enforcement of judicial mandates.[5]

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finding is plainly a prerequisite for issuing an interconnection order to require Bell System interconnection for specialized carriers to provide such a service.

[4] *FPC* v. *Idaho Power Co.*, *supra*, 344 U.S. at 21, and numerous cases cited at AT&T Pet. 15 n.22.

[5] It is sufficient to contrast the rule that failure to make "explicit mention" of an issue leaves the matter open for consideration on remand (*Perkins* v. *Standard Oil Co.*, 399 U.S. 222, 223 (1970)), with the lower court's admission that interconnection was not

Whatever the lower court may now say the *Execunet* mandate intended on a subject never addressed in the decision, the controlling principle is that the court cannot lawfully dictate how the agency shall exercise its regulatory power. This was the very holding of this Court in the *Pottsville* case in the face of a nearly identical claim by the lower court that it was merely compelling obedience to its prior mandate. 309 U.S. at 141, 145.

The *ultra vires* character of the lower court's interconnection order is also emphasized by respondents' claims that the FCC's declaratory ruling departed from the reasoning of *Execunet* in determining the scope of previous FCC interconnection orders. MCI Br. 16-17; SPCC Br. 13-14. A reviewing court [6] which found an inconsistency in reasoning [7] would properly exercise its ordinary judicial review function by remanding for further consideration free of the legal error. What it could not do is to determine the ultimate result by directing, as the lower court did here, that

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"addressed explicitly" in *Execunet*. Slip op. 11 (Pet. App. 10a-11a). Even respondents' own descriptions of *Execunet* do not so much as intimate that the interconnection issue was involved. MCI Br. 10; SPCC Br. 8. None of the lower court cases respondents cite on mandate construction (MCI Br. 18; SPCC Br. 14 n. 51) suggest that the reviewing court may, as here, extend its mandate to questions neither addressed nor decided on appeal.

[6] The lower court, which had before it only a motion to enforce a mandate, was not in this case properly sitting to review the merits of the declaratory order or pass upon the soundness of its reasoning.

[7] In fact, no such inconsistency exists; it is the lower court that has departed from its own earlier reasoning and assurances. See AT&T Pet. 14, n.21; MO&O, para. 61 (Pet. App. 36c-37c).

interconnection should be ordered at once and regardless of the agency's reconsideration.

The lower court has assumed here the power which the Communications Act vests in the agency. Consequently, this case, like *Pottsville, Idaho Power,* and *Vermont Yankee,* requires this Court "to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively" and to compel "due observance by courts of the distribution of authority made by Congress . . . ." 309 U.S. at 136, 141. In an era of extensive federal agency regulation and judicial review, few questions are more important or more deserving of review by this Court.

II. The Lower Court's Disregard of the Third Circuit's Exclusive Jurisdiction Presents a Fundamental Question Under the Hobbs Act.

The Hobbs Act, 28 U.S.C. § 2341 *et seq.,* allocates jurisdiction to review agency proceedings among the co-equal lower appellate courts. That act and related statutes establish important priorities of jurisdiction; their proper application is critically important to the fair administration and functioning of judicial review. These interests warranted the grant of certiorari in *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320 (1950),[8] and they justify review by this Court in other similar cases.

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[8] The bearing and importance of *City of Tacoma* is that MCI and SPCC, both parties in *Bell of Pennsylvania,* are bound by the Third Circuit's determination that AT&T's interconnection obligations are limited to private line services. Respondents themselves urged this result on the Third Circuit, and they were joined in that position by the FCC and the United States in a brief signed by the Assistant Attorney General of the Antitrust Division of the Department of Justice. See MO&O paras. 48-49 (Pet. App. 28c-29c).

Clearly this is such a case. The Third Circuit held in *Bell of Pennsylvania* that the FCC did not and, on the existing record could not, order interconnection for specialized carrier services other than private line services. 503 F.2d at 1273-74 (Pet. App. 42g). Under the Hobbs Act, the Third Circuit had obtained "exclusive jurisdiction" and its resolution of the scope of interconnection obligations was "final." 28 U.S.C. §§ 2349, 2350. Nevertheless, the court below has now said that the FCC must order interconnection for a service determined by the expert agency to be the opposite of private line service. See Slip op. 16 (Pet. App. 15a). The FCC correctly observes that it faces the "dilemma of whether to obey one circuit or the other" (FCC Pet. 26), because it is impossible to obey both. The Hobbs Act's grant of exclusive jurisdiction has plainly been ignored.[9]

Respondents seek to avoid the Third Circuit's clear determination that interconnection was limited to private line service by suggesting that that determination was dictum, unimportant, or addressed to concerns not here present. MCI Br. 18-20; SPCC Br. 17-18. However, the very rationale of the interconnection orders in *Bell System Tariff Offerings* was to implement full and fair competition in *private line* services. 46 F.C.C.2d at 427. The Third Circuit affirmed those orders—in the face of vagueness and overbreadth concerns—only be-

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[9] MCI's suggestion that AT&T decided to "accept" the lower court's jurisdiction (MCI Br. 14-15) is contrary to fact. MCI first interjected the interconnection question into this case by its purported motion to enforce the mandate, and AT&T—citing the Hobbs Act grant of exclusive jurisdiction—immediately objected that the Third Circuit was the proper forum to consider the issue. AT&T opp., March 2, 1978, pp. 19, 25.

cause their scope was limited to interconnection elements of "private line service." 503 F.2d at 1273-74 (Pet. App. 42g). Only by distorting history and ignoring the Third Circuit's own language can respondents pretend to reconcile the decisions.

Respondents also contend that even if the Third Circuit did confine the interconnection orders to private line service, "the term 'private line' was used as an abbreviated expression or shorthand for a broader category." MCI Br. 20. See SPCC Br. 18. Whether broad or narrow, no rational construction of the private line concept could extend it to ordinary long distance service, like Execunet, which the FCC has found to be the very antithesis of private line service. 60 F.C.C.2d at 42, 59-62. Moreover, since there is at present no public interest finding that switched public message competition is in the public interest, no extension of the interconnection obligation to such a service could be valid under Section 201(a).[10]

Like the question of court and agency authority, the authority of one federal court *vis-à-vis* another is the type of issue properly resolved by this Court. The issue is sharpened where, as here, the inconsistent decisions of the reviewing courts concern the same agency orders, involve the same parties, and produce an outcome which is a logical impossibility. See AT&T Pet. 20. The mediating exclusivity provision of the Hobbs Act was designed to resolve precisely this type of case, but it will be virtually a dead letter unless enforced by this Court.

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[10] While the FCC could expand the existing interconnection orders after new hearings and public interest findings, it has never purported to issue any new orders after those reviewed in the 1974 *Bell of Pennsylvania* decision.

III. Respondents' Miscellaneous Arguments Against Review by This Court Are Without Merit.

In attempting to defeat certiorari, MCI and SPCC offer several other arguments, none of which has merit. Much of MCI's brief is devoted to rhetorical accusation and innuendo which is largely irrelevant and entirely baseless.[11] Several of the more general contentions do deserve brief comment, not least because they actually emphasize the importance of certiorari in this case.

1. Respondents argue quite wrongly that this case is simply a reiteration of *Execunet*. See, *e.g.*, SPCC Br. 14-15. *Execunet* involved specialized carrier authority, not interconnection, which the lower court itself described as a "very different issue."[12] 561 F.2d at 378 n.59 (Pet. App. 25i). Moreover, *Execunet*, whether or not wrongly decided, presented a conventional issue of statutory construction and resulted in a remand; by contrast, in the present case, the issues arise not from mere legal error but from the lower court's fundamental mis-assumption of authority to dictate the agency's result and from its invasion of the exclusive jurisdiction of a coordinate court.

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[11] MCI is especially egregious in suggesting that AT&T ever conceded in *Execunet* that the Bell System was or would be obligated to provide interconnection for Execunet type service. MCI Br. 15-16. Interconnection was simply not at issue in *Execunet*. See AT&T Pet. 8, 15.

[12] There is no basis for MCI's claim (MCI Br. 22) that AT&T is precluded from questioning AT&T's obligation to provide interconnection because AT&T did not raise the issue in *Execunet*. The *Execunet* proceeding was entirely concerned with MCI's tariff authority. Moreover, the scope of the interconnection obligation had already been litigated in and resolved by the Third Circuit.

2. Alternatively, respondents argue that denial of interconnection would render the *Execunet* decision nugatory. MCI Br. 18; SPCC Br. 15. *Execunet* established that the FCC could not reject MCI's Execunet tariffs based on limitations on specialized carrier authority; and that determination is not altered by concluding that MCI has not yet established that the public interest would be served by the interconnection of its facilities with those of other carriers so that it may provide switched public message service. The "futility" argument made by respondents is not only devoid of logic [13] but was explicitly rejected by this Court in *Pottsville*. 309 U.S. at 145-46.

3. MCI argues that it is necessary to full and fair competition that it be entitled to use Bell System interconnection facilities to divert to MCI's network intercity switched public message traffic that would otherwise be carried on Bell System's intercity facilities. However, this is exactly the type of public interest question that the FCC is entitled to resolve before any such interconnection is ordered. See Section 201 (a). MCI's own argument here, also made in the court below, emphasizes how much MCI's position rests on persuading the courts to displace the Commission in establishing communications policy.

4. Finally, SPCC points to FCC rulemaking proceedings and to proposed legislation to support its erroneous claim that certiorari would be premature.

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[13] Litigation is often won without carrying the appellant the full distance to his ultimate goal. *Mutual Life Insurance Company* v. *Hill*, 193 U.S. 551, 553 (1904). The lower court itself recognized that "litigation in the courts does not always provide the victor with all that he might wish, or with all that he expected or thought he had won." Slip op. 10 (Pet. App. 9a).

SPCC Br. 19-21. The very pendency of these policy-making proceedings, however, confirms the lower court's error in preempting them. The legislative processes of Congress and the quasi-legislative processes of the FCC have just now been engaged to consider the complex and important public policy questions concerning the nature and scope of competition, if any, in long distance telephone service.[14] In directing the FCC to order interconnections for MCI's Execunet service, the lower court has not only taken one side in this undeniably important debate, but it has made national policy and dictated that its own views be implemented immediately.

* * *

By affirmatively ordering the FCC to require interconnection, the lower court in this case has crossed the line between reviewing agency decisions and dictating agency policy. From *Pottsville* in 1940 to the editorial advertising and cross-ownership cases in recent years,[15] this Court has been alert to correct the lower court wherever it has trespassed across that line. Certiorari is no less essential here to assure that communications policy is made by the Commission, as intended by Congress, and not by the District of Columbia Circuit.

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[14] As MCI states, the FCC is "now in the initial stages" of its inquiry (MCI Br. 26)—the agency has not yet even decided how to structure the proceeding. Similarly, the first round of subcommittee hearings on H.R. 13015, the recently proposed communications legislation, had not even finished before the bill's sponsor promised to redraft it. *Broadcasting*, Sept. 18, 1978, p. 23.

[15] *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973), *reversing Business Executives' Move For Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971); *FCC* v. *National Citizens Committee for Broadcasting*, 98 S. Ct. 2096 (1978), *reversing National Citizens Committee for Broadcasting* v. *FCC*, 555 F.2d 938 (D.C. Cir. 1977).

CONCLUSION

For the foregoing reasons and for the reasons stated in AT&T's petition, certiorari should be granted.

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SUPPLEMENTAL REPLY OF PETITIONER

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SUPPLEMENTAL REPLY OF PETITIONER

This supplemental reply is filed by AT&T in response to the memorandum filed by the Department of Justice. The Department concedes that "petitioners' contentions are not without some force" (Dep't Br. 11) but nevertheless opposes certiorari. The Department's tempered opposition, however, does not follow logically from its own analysis of the issues. On the contrary, that analysis actually reinforces the need for certiorari in this case.

1. The Solicitor General agrees that Section 201 of the Communications Act requires interconnection or-

ders to be based on FCC public interest findings. Dep't Br. 11. The United States also does not dispute that the court below could not properly have made these findings. Rather, the Department of Justice attempts to defend the interconnection order entered by the District of Columbia Circuit by contending that it is based on that court's interpretation of prior FCC public interest findings. *Id.* at 11-12.

The attempt fails for at least two reasons. First, the Solicitor General omits to mention that the FCC has consistently stated that it never made the public interest findings now attributed to it;[1] and the Department of Justice ignores the authorities of this Court that entitle this agency interpretation of its own prior language to controlling weight. *E.g., Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), and cases cited at AT&T Pet. 13 n.19. Second, the lower court itself has found that the FCC never made any public interest determinations concerning the desirability of competition among switched public message services like Execunet.[2] 561 F.2d at 378, 380 (Pet. App. 25i, 30i). In short, the necessary public interest findings—which the United States acknowledges must be made by the FCC—can only have been supplied improperly by the lower court.

Equally revealing are the Solicitor General's admissions that interconnection under Section 201 and carrier authorization under Section 214 are separate questions and that the lower court's order therefore necessarily requires construction of the FCC's interconnec-

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[1] *E.g.*, MO&O paras. 60-61 (Pet. App. 36c-37c); FCC Pet. 3.

[2] Indeed, the Solicitor General correctly observes that the FCC has just now begun a proceeding to examine and decide the matter. Dep't Br. 14.

tion orders in *Bell System Tariff Offerings*. Dep't Br. 11. Yet by the lower court's own concession, the matter of interconnection was not "addressed explicitly" in the *Execunet* case (slip op. 11 (Pet. App. 10a-11a)). Under the rule in *Perkins* that failure to make "explicit mention" of an issue leaves the matter open for consideration on remand,[3] interconnection cannot have been required by the *Execunet* mandate. The lower court's interconnection directive must therefore violate both the well-settled rules on mandate construction and the *Pottsville* prohibition against judicial exercise of administrative functions.

2. Additionally, the Solicitor General's assertion that the lower court's order does not conflict with the Third Circuit's *Bell of Pennsylvania* mandate is in error. Recognizing that "[t]he Third Circuit's opinion refers only to 'private line services,'" the Solicitor General nevertheless argues that the Commission has expanded this concept to include other "specialized services." Dep't Br. 13. However, the Commission has also made it clear that the term "specialized services" *excludes* ordinary long distance telephone service like Execunet (MO&O para. 59 (Pet. App. 34c-35c)).[4]

At any rate, it is what the Third Circuit held to be the extent of AT&T's interconnection obligation that is controlling for conflict purposes. The United States agrees that the precise scope of the FCC's orders in *Bell System Tariff Offerings* was at issue in *Bell of*

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[3] *Perkins* v. *Standard Oil Co.*, 399 U.S. 222, 223 (1970).

[4] The United States does not appear to disagree that the private line concept cannot rationally be construed to cover Execunet, which the FCC has found to be the very antithesis of private line service. 60 F.C.C.2d at 42, 59-62. See AT&T Pet. 21.

Pennsylvania, and does not deny its own prior representations (see MO&O para. 48 (Pet. App. 28c-29c)) —which the Third Circuit adopted—that the interconnection orders were limited to private line services. Dep't Br. 12-13.[5] In the absence of public interest findings, which clearly have not yet been made, any FCC interconnection order for services other than private line would violate the Third Circuit's mandate. By requiring the FCC to enter just such an order, the lower court has invaded the Third Circuit's exclusive jurisdiction under the Hobbs Act.

3. The Solicitor General's claim that this case is unimportant rests on the premise that the lower court did nothing more than interpret the FCC's previous interconnection orders. As we have shown, that premise is incorrect: the lower court had to supply public interest findings never made by the Commission or ignore the requirement for such findings; and it had to disregard a limiting construction of the same interconnection order adopted by the Third Circuit pursuant to its "exclusive jurisdiction." See pp. 2-4, above; FCC Pet. 29-32; AT&T Pet. 12-17; AT&T Reply 2-7.

Beyond this, the Solicitor General completely ignores a fundamental issue which by itself makes review essential in this case. By suggesting that the FCC eventually might conclude that the lower court's communications policy lacked a factual or public interest basis (Dep't Br. 14), the Department of Justice sanctions if not encourages the lower court's reversal of the roles

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[5] The Solicitor General's current reading of *Bell of Pennsylvania* makes the interconnection obligation virtually open-ended. Dep't Br. 11-12. Assuming this is the reading adopted by the D.C. Circuit, it is precisely contrary to the limiting construction adopted by the Third Circuit, at the urging of the United States.

established by the Congress and this Court for appellate courts and administrative agencies. To deny review in this case would excuse judicial usurpation of agency authority on the ground that agencies can institute proceedings to prove their reviewing courts wrong.[6] Few matters could be more important to the proper relationship of administrative agencies and lower appellate courts than the restoration of the FCC's mandated power in this case.[7]

Finally, the importance of this case is emphasized by the United States' previous position on the petitions for certiorari in *Execunet*. There, this Court was presented with a conventional issue of statutory construction that eventuated in a remand. Even so, the United States supported the grant of certiorari.[8] Here, in contrast, the lower court has gone far beyond matters of statutory interpretation and has jeopardized this Court's line of decisions from *Pottsville* to *Vermont Yankee* and threatened to undermine the Hobbs Act's allocation of judicial power. The issues involved in this case are important, recurring, and appropriate for review by this Court.

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[6] The Department of Justice position also fails to account for the overwhelming adverse if not irreparable impact of the lower court's action. By all responsible estimates, the Commission's inquiry into the appropriate market structure for switched public message services apparently is destined to continue for a very long time. In other words, absent certiorari in this case, the nation's public telecommunications network will for the foreseeable future be structured as the District of Columbia Circuit—not the FCC—has decided.

[7] The additional question of the Third Circuit's "exclusive jurisdiction," which the Solicitor General also ignores, is another independent basis for certiorari.

[8] Memorandum for the United States, *USITA* v. *MCI Telecommunications Corp.*, Sup. Ct. Nos. 77-420, *et al.*, November, 1977.

CONCLUSION

For the reasons stated above and in AT&T's petition and reply, certiorari should be granted.

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